Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers;	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPORT AND ORDER

Adopted: August 15, 2012 **Released: August 22, 2012**

By the Commission: Chairman Genachowski and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners McDowell and Pai dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order, we suspend, on an interim basis, our rules allowing for automatic grants of pricing flexibility for special access services in light of significant evidence that these rules, adopted in 1999, are not working as predicted, and widespread agreement across industry sectors that these rules fail to accurately reflect competition in today's special access markets.[1] We set forth a path to update our rules to better target regulatory relief to competitive areas, including extending relief to areas

[1] *See* 47 C.F.R. §§ 69.701 *et seq*.; *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14224-25, 14232-33, 14234-35, 14257-310, paras. 1-4, 19, 24-26, 67-175 (1999) (*Pricing Flexibility Order*), *aff'd WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). The term "special access services" encompasses all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an IXC's point of presence, where an IXC connects its network with the LEC network, or between two discrete end user locations. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25*; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1997, para. 7 (2005) (*Special Access NPRM*); *see also AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, 22 FCC Rcd 5662, 5677, para. 28 (2007) ("special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits").

that are likely competitive but have been denied regulatory relief under our existing framework. We provide for targeted relief in the interim through the forbearance process set forth in Section 10 of the 1996 Act, and will soon issue a comprehensive data collection order that will help craft permanent replacement rules.

2. Special access continues to play a critical role in our economy. Four of the largest incumbent LECs recently reported that their combined 2010 revenues from sales of DS1s and DS3s exceeded $12 billion.[2] Competitive carriers rely heavily on special access to reach customers; a large competitive local exchange carrier (LEC) that offers enterprise services to businesses using special access services as a critical input has reported that it purchases **[REDACTED]** times as many special access as Ethernet circuits.[3] Enterprise customers across the country rely on special access – directly or indirectly – to conduct their business.[4] Schools, libraries, and other institutions of state and local government depend on special access to provide services to their constituents.[5]

3. We continue to strongly believe, consistent with the goals set forth in the *Pricing Flexibility Order*, that regulation should be reduced wherever evidence demonstrates that actual or potential competition is acting as a constraint to ensure just and reasonable rates, terms and conditions for special access services. In the record of this proceeding, however, there is compelling evidence that our current pricing flexibility rules are not properly matching relief to such areas, combined with allegations that this mismatch is causing real harm to American consumers and businesses and hindering investment and innovation. Price cap carriers argue that they are still subject to burdensome regulation in areas where it is apparent that competition is thriving.[6] The United States Small Business Administration asserts that "promoting competition in the business broadband market is essential in order to provide small businesses with affordable access and choice regarding the services they need to grow and create new jobs."[7] The

[2] *See* Verizon Response to *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011) (*Special Access Competition Data Public Notice*), Question III.B.1 (listing combined DS1 and DS3 revenues of approximately **[REDACTED]**); AT&T Response to *Special Access Competition Data Public Notice*, Question III.B.1 (reporting combined DS1 and DS3 revenues of approximately **[REDACTED]**); CenturyLink Response to *Special Access Competition Data Public Notice*, Question III.B.1 (reporting combined DS1 and DS3 revenues of approximately **[REDACTED]**); FairPoint Response to *Special Access Competition Data Public Notice*, Question III.B.1 (reporting combined DS1 and DS3 revenues of approximately **[REDACTED]**). In the *Special Access Competition Data Public Notice,* at footnote 8, *citing* 5 C.F.R. § 1320.3(h)(4), we explained that the data solicited from the public was not subject to the Paperwork Reduction Act. *See Special Access Competition Data Public Notice,* 26 FCC Rcd at 14001 n. 8. Sprint asserts that "[s]pecial access is an $18 billion market." Letter from Charles W. McKee, Vice President – Government Affairs, Federal and State Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, WT Docket No. 02-55 at 2 (filed May 29, 2012).

[3] **[REDACTED]**

[4] Ad Hoc 2009 PN Comments at 1-5.

[5] *See, e.g.,* Letter from Paul Margie, Counsel for Sprint Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 4 (filed Aug. 17, 2010) (Sprint Aug. 17, 2010 *ex parte* Letter).

[6] *See, e.g.*, AT&T 2009 PN Comments at 28-38; Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM 10593, Attach. at 4 (filed May 2, 2012) (Verizon May 2, 2012 *Ex Parte* Letter).

[7] *See, e.g.*, SBA 2012 Comments, WT Docket No. 12-69, WC Docket Nos. 10-188, 05-25, RM-11358, GN Docket No. 09-51; *see also, e.g.*, Letter from Karen Reidy, Vice President, Regulatory Affairs, COMPTEL, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593 at 5 (filed June 1, 2010) (COMPTEL June 1, 2010 *Ex Parte* Letter).

American Petroleum Institute expresses concern that, because its member companies' facilities are frequently located in isolated locations where facilities-based competition is scarce, they are highly sensitive to incumbent LECs extracting supra-competitive profits.[8] Competitive carriers argue that the terms and conditions of special access contract tariffs "lock up" demand, preventing competitors from entering markets and investing in new facilities.[9] Wireless providers argue that high special access prices hinder their ability to hire employees, invest in their networks, and conduct research and development.[10] While we cannot yet evaluate these claims of competitive harm based on the evidence to date in the record, our finding that the competitive showings the Commission adopted as a proxy for competition are not working as predicted leads us to suspend the triggers and further evaluate the marketplace.

4. The approach we take is based on our evaluation of our 1999 rules, the predictive judgments upon which they were based, and market developments since their adoption.[11] As discussed in greater detail below, the Commission decided in 1999 to use an administratively simple proxy for the presence of actual or potential competition in special access markets – the extent of collocation within broad geographic regions.[12] The Commission predicted that certain levels of collocation within a Metropolitan Statistical Area (MSA) would serve as an accurate indicator of competitive pressure sufficient to constrain prices throughout that area.[13]

5. Based on the evidence in the record and thirteen years of experience with this regime, we now conclude that the Commission's existing collocation triggers are a poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices throughout an MSA. We therefore suspend, on an interim basis, the operation of those rules pending adoption of a new framework that will allow us to ensure that special access prices are fair and competitive in all areas of the country.[14]

6. Although we currently lack the necessary data to identify a permanent reliable replacement approach to measure the presence of competition for special access services, we emphasize that the

[8] *See, e.g.*, API 2007 PN Comments at 6; API 2007 PN Reply at 2, 5.

[9] *See, e.g.*, Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593 at 2-3 (filed Feb. 22, 2012) (Level 3 Feb. 22, 2012 *Ex Parte* Letter).

[10] *See, e.g.*, Letter from Charles W. McKee, Vice President, Government Affairs, Federal and State Regulatory, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-25, 06-74, RM-10593 at 2 (filed June 28, 2010) (Sprint June 28, 2010 *Ex Parte* Letter).

[11] *See infra* Section III.

[12] *See Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14621-62, para. 77 (1999) (*Pricing Flexibility Order*). The definition of "collocation" is set forth in para. 29, *infra*.

[13] MSAs are geographic areas defined by the Office of Management and Budget. A more detailed explanation of how MSAs are defined is set forth in para. 26, *infra*.

[14] We are committed to re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments. *See, e.g.*, *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (deferring to the Commission's predictive judgment "with the *caveat*, however, that, should the Commission's predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decisionmaking") (emphasis in original); *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) (deferring to the Commission's predictions about the level of competition, but stating that, if the predictions do not materialize, the Commission "will of course need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decision-making").

forbearance process set forth by Congress in the 1996 Act provides an avenue for targeted relief based on a complete analysis of competitive conditions in a geographic area.

7. Going forward, in the absence at this time of clear evidence to establish reasonable and reliable proxies to determine where regulatory relief is appropriate, we will collect necessary data and undertake a robust competition analysis that may identify reliable proxies for competition in the market for special access services going forward.[15] We will issue a comprehensive data collection order within 60 days to facilitate this market analysis.[16] We anticipate that during the pendency of the data request, we will continue to analyze the information submitted in the record, and may issue further decisions as warranted by the evidence. Nonetheless, the record in this proceeding demonstrates that a comprehensive evaluation of competition in the market for special access services is necessary, and that further data to assist us in that evaluation is needed with respect to establishing a new framework for pricing flexibility.

[15] Although we do not have sufficient data to fully resolve this proceeding by adopting new or revised permanent rules governing Phase I and/or Phase II pricing flexibility areas, the record supports our action today, and it is appropriate for us to rely on the data we have available to make incremental progress on this complicated issue. *See, e.g., FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1815 (2009) ("Nothing prohibits federal agencies from moving in an incremental manner."); *NAB v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) ("[A]dministrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux and in which an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken."). We also note that the analysis in these sections relies in part on information submitted to the Commission in response to the *Special Access Competition Data Public Notice* on or after the requested response date of December 5, 2011. *Compare infra* Dissenting Statement of Commissioner Robert McDowell (McDowell Statement) at 88-90 (asserting that additional data is needed based on, among other things, statements in a Commission brief filed in October 2011); *and* Dissenting Statement of Commissioner Ajit Pai (Pai Statement) at 94-97, 102 (noting the same), *with infra* para. 59 (citing data collected after October 2011), *and supra* para. 2 (citing data collected after October 2011). Moreover, evidence in the record suggests that the limited amount of facilities-based competition for channel terminations reflects problems in the special access market. For example, among other things, commenters have told us that ILEC DS1 and DS3 prices are oftentimes higher than CLEC prices to the same physical location. They have also told us that, in many instances, prices in Phase II areas are higher than prices in other areas. They also allege that the terms and conditions associated with the sale of ILEC services are anticompetitive and inhibit competitors' ability to attract new customers and build new facilities. Though we acknowledge the need to obtain more specific data to evaluate these allegations fully, it is highly likely that these factors, rather than others, reflect and have contributed to the low level of facilities-based competition for channel terminations. *Compare* Letter from Erin Boone, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 05-25, Attach at 6-8 (filed June 28, 2012) (**[REDACTED]** and alleging that ILEC terms and conditions "lock up" the customer demand needed to make building competing facilities economic for CLECs like Level 3), *and* tw telecom 2007 PN Comments at 29-31 (noting that "special access purchasers have already placed substantial evidence on the record in this proceeding demonstrating that month-to-month and term tariff rates have nearly universally increased in Phase II areas to levels higher than is the case in price cap markets"), *with infra* Pai Statement at 101 (stating that one reason competitors may not have deployed channel termination facilities is that price cap rates, in combination with potential competition, have "constrained special access prices so much that competitive deployment of last-mile channel terminations is unprofitable").

[16] The data collection will become effective once it has received final approval from the Office of Management and Budget in accordance with the Paperwork Reduction Act. While it is difficult to predict the exact timing on such approval, we can anticipate that the approval process and data collection will take several months. The Commission will then need to analyze the data. Thus we will aim for final conclusions on the need for overall reform of the special access marketplace to occur in 2013. It is our intent that we work as quickly as possible to conclude this proceeding as soon as possible to provide all parties the certainty they seek in the marketplace.

II. BACKGROUND

A. History of Price Cap Regulation

8. Through the end of 1990, interstate access charges were governed by "rate-of-return" regulation, under which incumbent LECs calculated their access rates using projected costs and projected demand for access services.[17] An incumbent LEC was limited to recovering its costs plus a prescribed return on investment. It also was potentially obligated to provide refunds if its interstate rate of return exceeded the authorized level. However, a rate of return regulatory structure bases a firm's allowable rates directly on the firm's reported costs and was thus subject to criticisms that it removed the incentive to reduce costs and improve productive efficiency.[18]

9. Consequently, in 1991 the Commission implemented a system of price cap regulation that altered the manner in which the largest incumbent LECs (often referred to today as price cap LECs) established their interstate access charges.[19] The Commission's price cap plan for LECs was intended to avoid the perverse incentives of rate-of-return regulation in part by divorcing the annual rate adjustments from the cost performance of each individual LEC, and provide for sharing efficiency gains with customers in part by adjusting the cap based on industry productivity experience.[20]

10. In contrast to rate-of-return regulation, which focuses on an incumbent LEC's costs and fixes the profits an incumbent LEC may earn based on those costs, price cap regulation focuses primarily on the prices that an incumbent LEC may charge. The access charges of price cap LECs originally were set at levels based on the rates that existed at the time the LECs entered the price cap regime. Increases in their rates have, however, been limited over the course of price cap regulation by price indices that are adjusted annually pursuant to formulae set forth in Part 61 of our rules.[21] Price cap regulation is a form of incentive regulation that seeks to "harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services."[22] A core component of our price cap regulation is the Price Cap Index (PCI). As the

[17] Since 1981, the Commission has allowed certain smaller incumbent LECs to base their access rates on historic, rather than projected, cost and demand. *See* 47 C.F.R. § 61.39.

[18] *See Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94.1; *Low-Volume Long-Distance Users*, CC Docket No. 99-249; *Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 12968, paras. 13, 15 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part, Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand, Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Order on Remand, 18 FCC Rcd 14976 (2003); *see also Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868 (2002), *aff'd, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454 (D.C. Cir. 2004).

[19] The Commission required price cap regulation for the BOCs and GTE, and permitted other LECs to elect price cap regulation voluntarily, provided that all their affiliates also convert to price cap regulation and that they withdraw from the pools administered by the National Exchange Carrier Association (NECA). *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20, paras. 257-59 (1990) (*LEC Price Cap Order*), *aff'd Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993). Most small LECs elected to remain subject to rate-of-return regulation.

[20] *See CALLS Order*, 15 FCC Rcd at 12968, para. 14.

[21] *See* 47 C.F.R. § 61.45.

[22] *LEC Price Cap Order*, 5 FCC Rcd at 6787, para. 2.

Commission has explained previously, the PCI is designed to limit the prices LECs charge for service.[23] The PCI provides a benchmark of LEC cost changes that encourages price cap LECs to become more productive and innovative by permitting them to retain reasonably higher earnings.[24] The PCI has three basic components: (1) a measure of inflation, *i.e.*, the Gross Domestic Product (chain weighted) Price Index (GDP-PI);[25] (2) a productivity factor or "X-Factor," that represents the amount by which LECs can be expected to outperform economy-wide productivity gains;[26] and (3) adjustments to account for "exogenous" cost changes that are outside the LEC's control and not otherwise reflected in the PCI.[27]

B. Pricing Flexibility

11. Pursuant to the pro-competitive, deregulatory mandates of the 1996 Act, the Commission in 1996 began exploring whether and how to remove price cap LECs' access services from price cap and tariff regulation once they are subject to substantial competition.[28] Three years later, in 1999, the Commission adopted the *Pricing Flexibility Order* in an effort to ensure that the Commission's interstate access charge regulations did not unduly interfere with the operation of interstate access markets as competition developed in those markets.[29] The Commission developed competitive showings (also referred to as "triggers") designed to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities.[30] Price cap carriers that demonstrated the competitive showings were met in their serving areas could obtain so-called "pricing flexibility," namely the ability to offer special access services at unregulated rates through generally available and individually negotiated tariffs (*i.e.*, contract tariffs).[31] The operation of the pricing flexibility rules is discussed in greater detail in section A below.

C. The CALLS Order

12. In 2000, after a comprehensive examination of the interstate access charge and universal service regulatory regimes for price cap carriers, the Commission adopted the industry-proposed CALLS

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[23] *Id.* at 6792, para. 47. To ascertain compliance with the PCI, LEC rate levels within each basket are measured through the use of an Annual Price Index (API). The API is the weighted sum of the percentage change in LEC prices. The API weights the rate for each rate element in the basket based on the quantity of each element sold in a historical base year. The historical base year is the calendar year that immediately precedes the annual tariff filing on July 1. A price cap LEC's rates are in compliance with the cap for a basket if the API is less than or equal to the PCI.

[24] *Id.* at 6787, 6792, paras. 2-3, 47.

[25] *CALLS Order*, 15 FCC Rcd at 13038-39, paras. 183-84.

[26] *Id.* at 6795-801, paras. 74-119.

[27] *Id.* at 6792, 6807-10, paras. 48, 166-90. Exogenous costs are incurred due to administrative, legislative, or judicial action beyond the LEC's control. *See id*. at 6807, para. 166.

[28] *See Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Transport Rate Structure and Pricing*, CC Docket No. 91-213; *Usage of the Public Switched Network by Information Service and Internet Access Providers*, 96-263, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21357-58, 21363, paras. 1, 15 (1996) (*Access Charge NPRM, Order, and NOI*).

[29] *Pricing Flexibility Order*, 14 FCC Rcd at 14224, para. 1.

[30] *Id.* at 14261, paras. 77-83. The competitive showings are described in greater detail in section III.A, *infra***.**

[31] *Id.* at 14287-94, 14301-02, paras. 122-33, 153-55. Although the Commission developed pricing flexibility triggers for both special access and switched access services, we addressed only special access services in the *Special Access NPRM*.

plan.[32] This plan represented a five-year interim regime designed to phase down implicit subsidies and (as it pertained to switched and special access charges) to move towards a more market-based approach to rate setting.[33] In adopting the CALLS plan, the Commission offered price cap carriers the choice of completing the forward-looking cost studies required by the *Access Charge Reform Order*[34] or voluntarily making the rate reductions required under the five-year CALLS plan.[35] The Commission permitted carriers to defer the planned forward-looking cost studies in favor of the CALLS plan because it found the plan to be "a transitional plan that move[d] the marketplace closer to economically rational competition, and it [would] enable [the Commission], once such competition develops, to adjust our rules in light of relevant marketplace developments."[36] All price cap carriers opted for the CALLS plan.[37]

13. The CALLS plan separated special access services into their own basket[38] and applied a separate X-factor to the special access basket.[39] The X-factor under the CALLS plan, unlike under prior price cap regimes, is not a productivity factor. Rather, it represents "a transitional mechanism . . . to lower rates for a specified period of time for special access."[40] The special access X-factor was 3.0 percent in 2000 and 6.5 percent in 2001, 2002, and 2003. In addition to the X-factor, access charges under CALLS are adjusted for inflation as measured by the GDP-PI.[41] For the final year of the CALLS plan (July 1, 2004 – June 30, 2005), the special access X-factor was set equal to inflation, thereby freezing rate levels.[42] Thus, in the absence of a new price cap regime post-CALLS, price cap LECs' special access rates have remained frozen at 2003 levels[43] (excluding any necessary exogenous cost

[32] *CALLS Order*, 15 FCC Rcd at 12962.

[33] *See id.* at 12965, 12977-79, paras. 4, 36-42.

[34] *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Transport Rate Structure and Pricing*, CC Docket No. 91-213; *End User Common Line Charges*, CC Docket No. 95-72, First Report and Order, 12 FCC Rcd 15982, 16007-34, paras. 67-122 (1997) (*Access Charge Reform Order*), *aff'd Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

[35] *Id.* at 12974, 12983-86, paras. 29, 56-62.

[36] *Id.* at 12977, para. 36.

[37] *But see Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-131, Order, 17 FCC Rcd 24319, 24320, at para. 3 (2002). In that order, the Commission allowed Iowa Telecom to set its average traffic sensitive rate at forward-looking cost levels instead of at the CALLS rate of $0.0095 per minute. *Id.* at 24328, para. 24.

[38] A price cap basket is a broad grouping of services, such as special access services. Prices for services within a basket are limited by the price cap index (PCI) for the basket, which limits the LEC's pricing flexibility and its incentives to shift costs. *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6810-11, paras. 198-203 (1990) (*LEC Price Cap Order*), *aff'd Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[39] *CALLS Order*, 15 FCC Rcd at 12974-75, 13033-34, paras. 30, 172. The CALLS plan also retained the low-end adjustment for price cap LECs. *Id*. at 13038, para. 182.

[40] *Id.* at 13028, para. 160.

[41] *Id.* at 13038, para. 183.

[42] *Id.* at 13025, para. 149. Because rates are both reduced by and increased by the inflation rate, they are effectively frozen. *See supra* para. 10.

[43] Because the special access rates were reduced by a universally applied productivity factor, all LECs achieved the 2003 special access rate target at the same time.

adjustments).[44] The Commission hoped that, by the end of the five-year CALLS plan, competition would exist to such a degree that deregulation of access charges (switched and special) for price cap LECs would be the next logical step.[45]

D. AT&T's Petition for Rulemaking and 2005 Special Access NPRM

14. On October 15, 2002, AT&T Corp. filed a petition for rulemaking requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan as it pertains to the rates that price cap LECs, and the BOCs in particular, charge for special access services.[46] AT&T claimed that the competitive showings required to obtain pricing flexibility failed to predict price-constraining competitive entry and, rather, that significant competitive entry had not occurred.[47] It further contended that, based on Automated Reporting Management Information System (ARMIS) data, the BOCs' interstate special access revenues had more than tripled, from $3.4 billion to $12.0 billion, between 1996 and 2001 and that the BOCs' returns on special access services were between 21 and 49 percent in 2001.[48] Further, AT&T stated that, in every MSA for which pricing flexibility was granted, BOC special access rates either remained flat or increased.[49] Thus, AT&T contended both that the predictive judgment at the core of the *Pricing Flexibility Order* had not been confirmed by marketplace developments, and that BOC special access rates exceeded competitive levels and hence were unjust and unreasonable in violation of section 201 of the Communications Act.[50] Because the predictive judgment had proven wrong, AT&T asserted, the Commission was compelled to revisit its pricing flexibility rules in a rulemaking proceeding.[51]

15. Price cap LECs generally opposed the *AT&T Petition for Rulemaking*. They claimed that their special access rates were reasonable and therefore lawful, that there was robust competition for special access services, that the collocation-based competitive showings were an accurate metric for competition, and that the data relied upon by AT&T were unreliable in the context used by AT&T.[52]

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[44] 47 C.F.R. § 61.45(b)(1)(iv) ("Starting in the 2004 annual filing, X shall be equal to GDP-PI for the special access basket.").

[45] *CALLS Order*, 15 FCC Rcd at 12977, para. 35.

[46] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 at 1, 6, 39-40 (Filed on October 15, 2002) (2002 Special Access Rulemaking Petition). Competitive LECs and telecommunications users generally supported the *AT&T Petition for Rulemaking*. *See, e.g.*, 2002 Special Access Rulemaking Petition, RM-10593, Comments of Ad Hoc Telecommunications Users Committee at 1-7 (filed Dec. 2, 2002); 2002 Special Access Rulemaking Petition, RM-10593, Comments of American Petroleum Institute at 1-5 (filed Dec. 2, 2002); 2002 Special Access Rulemaking Petition, RM-10593, Comments of AT&T at 1-7 (filed Dec. 2, 2002); 2002 Special Access Rulemaking Petition, RM-10593, Comments of PAETEC at 1-6 (filed Dec. 2, 2002); 2002 Special Access Rulemaking Petition, RM-10593, Comments of WorldCom at 1-14 (filed Dec. 2, 2002). The 2002 Special Access Rulemaking Petition was filed prior to AT&T's merger with SBC; *see SBC Communications, Inc. and AT&T Corp. Application for Approval of Transfer of Control,* WC Docket No. 06-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) (*SBC/AT&T Merger Order*).

[47] 2002 Special Access Rulemaking Petition at 2, 6-7, 11-13, 20, 25-32.

[48] *Id.* at 3-4, 8-9, 14.

[49] *Id.* at 11-13.

[50] *Id.* at 1-6, 20, 34-35.

[51] *Id.* at 6-7, 35-36.

[52] *See, e.g.*, 2002 Special Access Rulemaking Petition, RM-10593, SBC Opposition to Petition at 10-13, 19, 22-24 (filed Dec. 2, 2002); 2002 Special Access Rulemaking Petition, RM-10593, Verizon Opposition to Petition at 9-10, 13-14, 17, 21 (filed Dec. 2, 2002).

SBC noted that AT&T only provided (and could only provide) data from a single year (2001) that post-dated the initial implementation of Phase II pricing flexibility in 2001,[53] and SBC and Verizon claimed that ARMIS data were not designed to evaluate the reasonableness of rates.[54] The BOCs contended, moreover, that special access revenues per line declined between 1996 and 2001.[55]

16. On January 31, 2005, the Commission released the *Special Access NPRM*. The *Special Access NPRM* initiated a broad examination of what regulatory framework to apply to price cap LECs' interstate special access services following the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules for special access services.[56] As part of our review of the pricing flexibility rules, which were adopted, in part, based on the Commission's predictive judgment, the Commission sought to examine whether the available marketplace data supported maintaining, modifying, or repealing these rules.[57] The Commission noted its commitment to re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments.[58] Accordingly, the Commission sought data and comments on whether actual marketplace developments supported the predictive judgments used to support the special access pricing flexibility rules.[59]

17. The *Special Access NPRM* also responded to AT&T's request for interim relief. AT&T asked, in addition to initiating a rulemaking, that the Commission reinitialize Phase II pricing flexibility special access rates at an 11.25 percent rate of return, and impose a temporary moratorium on further pricing flexibility applications.[60] These requests were denied; however, the Commission sought comment on whether to adopt any interim requirements in the event that the Commission was unable to conclude the NPRM in time for any adopted rule changes to be implemented in the 2005 annual tariff filings.[61]

E. Recent Actions in the Proceeding

1. Refresh Record

18. In July 2007, the Commission invited interested parties to update the record in the special access rulemaking in light of a number of recent developments in the industry, including several "significant mergers and other industry consolidation," "the continued expansion of intermodal competition in the market for telecommunications services," and "the release by GAO [the Government Accountability Office] of a report summarizing its review of certain aspects of the market for special access services."[62] While the special access rulemaking was pending, the Commission also addressed special access regulation for price cap carriers in several other proceedings. A petition for forbearance

[53] SBC 2002 Special Access Rulemaking Petition Opposition at 16.

[54] *Id.* at 22; Verizon 2002 Special Access Rulemaking Petition Opposition at 21.

[55] SBC 2002 Special Access Rulemaking Petition Opposition at 23-24, Decl. of Alfred E. Kahn and William E. Taylor at 15.

[56] *Special Access NPRM*, 20 FCC Rcd at 1955, para. 1.

[57] *Id.* at 1996-97, para. 5.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 1997, para. 6.

[61] *Id.*

[62] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, 22 FCC Rcd 13352, 13352-53 (2007) (*Refresh the Record Public Notice*).

from dominant carrier regulation of enterprise broadband special access services (*i.e.*, packet-based switched, high-speed telecommunications services for businesses) filed by Verizon was deemed granted in 2006.[63] In orders issued in October 2007 and August 2008, the agency granted petitions filed by AT&T, Embarq, Frontier, and Qwest under 47 U.S.C. § 160 seeking similar forbearance relief, and, in August 2008, granted Qwest's petition for similar relief from regulation of enterprise broadband special access. [64]

2. Analytical Framework

19. In November 2009, the Commission sought comment on the appropriate analytical framework for examining the issues that the *Special Access NPRM* raised.[65] In July 2010, the Commission's Wireline Competition Bureau (Bureau) held a staff workshop on the economics of special access to gather further input from interested parties on the analytical framework the Commission should use – and the data it should collect – to evaluate whether the current special access rules are working as intended.[66]

3. Voluntary Data Requests

20. In October 2010, the Bureau issued a public notice inviting the public to submit data on the presence of competitive special access facilities to assist the Commission in evaluating the issues that the *Special Access NPRM* raised.[67] Explaining that data "would need to be reviewed" before the Commission

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[63] *See* Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (*March 20 News Release*); *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (filed Dec. 20, 2004).

[64] *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(C) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements, Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Service*, FCC 07-184, WC 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services, Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services,* FCC 07-180, WC 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, FCC 08-168, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008). We note that a similar petition filed by CenturyLink is pending before the Commission. *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60 (filed Feb. 23, 2012), *amended by* Letter from Craig J. Brown, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 12-60 (filed March 21, 2012).

[65] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009) (*Analytical Framework Public Notice*).

[66] *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, WC Docket No. 05-25, Public Notice, 25 FCC Rcd 8458 (2010) (*Staff Workshop Public Notice*).

[67] *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146(2010) (*Special Access Facilities Data Public Notice*); *see also Clarification of Data Requested in Special Access NPRM,* WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 17693 (2010) (*Special Access Facilities Data Request Clarification*). In the *Special Access Facilities Data Public Notice,* at footnote 7, *citing* 5 (continued….)

could address the issues raised by the proceeding,[68] the Bureau asked that the requested data be submitted by January 27, 2011.[69] The Bureau also noted that while it continued to develop an analytical framework, it would "ask for additional voluntary submissions of data in a second public notice."[70]

21. On September 19, 2011, the Bureau issued a second public notice requesting the submission of special access data.[71] In this request, the Bureau sought detailed data on special access prices, revenues, and expenditures, as well as the nature of terms and conditions for special access services. The Bureau requested that the data be submitted to the Commission by December 5, 2011.[72]

III. THE "COMPETITIVE SHOWINGS" ADOPTED IN 1999 HAVE NOT WORKED AS EXPECTED

22. In the *Pricing Flexibility Order*, the Commission adopted rules intended to allow price cap LECs to show, in an administratively workable way, that certain parts of the country were sufficiently competitive to warrant pricing flexibility for special access services. As discussed in greater detail below, we find that the record indicates that the administratively simple competitive showings we adopted in 1999 have not worked as intended, likely resulting in both over- and under- regulation of special access in parts of the country. We therefore suspend the pricing flexibility competitive showings, on an interim basis, until we obtain the requisite data and conduct the market analysis required to craft replacement rules.

A. Background

1. Rationale for Competitive Showings

23. In the *Pricing Flexibility Order*, the Commission adopted rules that allow price cap LECs to obtain relief from pricing regulations as competition for special access services increased. The Commission concluded that relief should be granted in two phases. Phase I relief permits price cap LECs the ability to lower their rates through contract tariffs and volume and term discounts, but requires that they maintain their generally available price cap-constrained tariff rates to "protect those customers that lack competitive alternatives."[73] Phase II relief permits price cap LECs to raise or lower their rates throughout an area, unconstrained by the Commission's part 61 and part 69 rules.[74]

24. The Commission found that different levels of collocation in an area would justify different levels of relief. Specifically, the Commission held that Phase I deregulatory relief would be appropriate in areas where the price cap LEC was able to show that competitors had made irreversible, sunk

(Continued from previous page)
C.F.R. § 1320.3(h)(4), we explained that the data solicited from the public was not subject to the Paperwork Reduction Act. *See Special Access Facilities Data Public Notice,* 25 FCC Rcd at 15147 n. 7.

[68] *Special Access Facilities Data Public Notice*, 25 FCC Rcd at 15146.

[69] *Id.* at 15147.

[70] *Id.*

[71] *Special Access Competition Data Public Notice*, 26 FCC Rcd 14000.

[72] *Id.*

[73] *Pricing Flexibility Order*, 14 FCC Rcd at 14258, para. 69.

[74] *Id.* at 14301, para. 153. For a definition of MSA, *see infra* para. 26. Price cap LECs granted Phase II relief must continue to maintain generally available tariffs, but may file such tariffs on one day's notice. *See Id.* at 14301, para. 153.

investment sufficient to "discourage[e] incumbent LECs from successfully pursuing exclusionary strategies,"[75] such as "'locking up' large customers by offering them volume and term discounts."[76]

25. The Commission held that Phase II deregulatory relief would be appropriate only in areas where a price cap LEC could show there was a higher level of collocation – specifically, that "competitors have established a significant market presence, *i.e.*, that competition for a particular service within the [area] is sufficient to preclude the incumbent from exploiting any monopoly power over a sustained period."[77] That is, competitors would have "sufficient market presence to constrain prices throughout the" area because "almost all special access customers have a competitive alternative" and "[i]f an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rate will induce competitive entry, and that entry will in turn drive rates down."[78]

2. How the Competitive Showings Work

26. *Geographic Area of Relief*. The Commission chose to grant pricing flexibility relief on an MSA basis, finding that, among the proposed alternatives "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition" and avoiding the "increased expenses and administrative burdens associated with" proposals to grant relief in smaller geographic areas, such as wire centers.[79] The Office of Management and Budget (OMB) defines MSAs as geographic entities that contain a core urban area of 50,000 or more population, and often includes adjacent counties that have a high degree of social and economic integration with the urban core, as measured by commuting to work.[80] MSAs were developed not for the purposes of competition policy, but to meet the Federal Government's need to have "nationally consistent definitions for collecting, tabulating and publishing Federal statistics for a set of geographic areas."[81] OMB may add counties or principal cities to an MSA, remove them, or even create new MSAs if census and population estimates indicate changes in social and economic integration between outlying areas and the urban core.[82]

[75] *Id.* at 14258, para. 69.

[76] *Id.* at 14263, para. 79.

[77] *Id.* at 14296, para. 141.

[78] *Id.* at 14262, 14296-97, paras. 77, 142, 144.

[79] *Id.* at 14260, paras. 72, 74.

[80] 47 C.F.R. § 22.909(a); *see also* U.S. Census Bureau, Metropolitan and Micropolitan Statistical Areas, www.census.gov/population/metro/ (last visited Aug. 13, 2012).

[81] Office of Management and Budget, Bulletin no. 10-02, Updates of Statistical Area Definitions and Guidance on their Uses 1 (2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/bulletins/b10-02.pdf (*OMB 2009 MSA Update*). OMB establishes and maintains the definitions of MSAs, and cautions against using MSAs for non-statistical purposes "without full consideration of the effects of using these definitions for such purposes." *Id.* at 2.

[82] *See id.*, App. at 1. For example, in 2003 OMB defined 370 MSAs, whereas its most recent list includes 374. Office of Management and Budget, Bulletin no. 03-04, Revised Definitions of Metropolitan Statistical Areas, New Definitions of Micropolitan Statistical Areas and Combined Statistical Areas, and Guidance on Uses of the Statistical Definitions of Those Areas, Attach., List 2 (Metropolitan Statistical Areas) at 22 (2003), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/bulletins/b03-04_attach.pdf (listing 370 MSAs in the United States and Puerto Rico); *see also OMB 2009 MSA Update*, App., List 2 (Metropolitan Statistical Areas) at 23 (listing 374 MSAs in the United States and Puerto Rico).

27. In the *Pricing Flexibility Order*, the Commission adopted a list of 306 MSAs based largely on data compiled from the 1980 census, and froze that list for use in all pricing flexibility petitions.[83] Therefore, even if OMB subsequently expanded the geographic area of an MSA, a price cap LEC's grant of pricing flexibility remains within the borders of the applied-for MSA. The Commission also recognized that some price cap LEC study areas fall outside of MSA boundaries, and held that it would "grant price cap LECs pricing flexibility within the non-MSA parts of a study area if" they were able to make the required showings "throughout that area."[84]

28. MSAs can be geographically extensive and, in many cases, may encompass areas with vastly different business density within their borders. Some illustrative examples include the Pensacola, Florida MSA[85] and the Atlanta, Georgia MSA.[86]

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[83] *See Pricing Flexibility Order,* 14 FCC Rcd at 14259, para. 71 n. 193 (citing *Common Carrier Public Mobile Services Information, Cellular MSA/RSA Markets and Counties*, Public Notice, Report No. CL-92-40, 7 FCC Rcd 742 (1992) (*1992 MSA/RSA Public Notice*) (containing 306 areas that were defined by OMB but "as modified by the FCC")); *see also* 47 C.F.R. § 22.909. MSA analysis in this Order refers to these modified MSAs unless otherwise noted.

[84] *Pricing Flexibility Order*, 14 FCC Rcd at 14261, para. 76.

[85] The Pensacola, Florida MSA ("Pensacola MSA") encompasses the counties of Escambia and Santa Rosa, city of Pensacola, employment centers such as Naval Air Station Pensacola and the University of West Florida. The Pensacola MSA also includes Jay, Florida, an agricultural town approximately 50 miles from Pensacola on the other side of the Escambia River Wildlife Management Area. The density of business establishments in the Jay, Florida ZIP code (32565) is about 0.37 per square mile, whereas the density of business establishments in the City of Pensacola (approximated by ZIP codes 32501-4) is about 100 per square mile. The density of business establishments across the entire Pensacola, FL MSA is about 6. *See, e.g.,* Commander Navy Installations Command Naval Air Station Pensacola, http://www.cnic.navy.mil/pensacola/ (last visited Aug. 13, 2012); University of West Florida, http://www.uwf.edu/ (last visited Aug. 13, 20102) Town of Jay, Florida, http://townofjayfl.com/about.htm (last visited Aug. 13, 2012); Esacambia River Wildlife Management Area, http://myfwc.com/viewing/recreation/wmas/cooperative/Escambia-River (last visited Aug. 13, 2012). Business establishment data are from U.S. Census Bureau. U.S. Census Bureau, County Business Patterns/ZIP Code Business Patterns (2009), ftp://ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip; *see also* U.S. Census Bureau, County Business Patterns (ZBP), http://www.census.gov/econ/cbp/index.html (last visited Aug. 13, 2012). The number of business establishments was normalized to square miles using U.S. Census Bureau data. U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012). Establishment density was calculated by summing the establishment counts across the sets of ZIP codes that approximate the geographic extent of regions estimated (*i.e.*, the city of Jay, the city of Pensacola and Pensacola MSA) and dividing by the total area of the ZIP code set.

[86] The Atlanta, Georgia MSA ("Atlanta MSA") includes Fulton and De Kalb counties, which encompass the city of Atlanta, and Butts County, which encompasses Flovilla, Georgia. *See 1992 MSA/RSA Public Notice,* 7 FCC Rcd at 743; *OMB 2009 MSA Update*. Atlanta houses major employers such as Coca-Cola Company and CNN and has about 99 business establishments per square mile. In contrast, ZIP Code 30216 (Flovilla, Georgia) covers the city of Flovilla and contains 13 business establishments in total. The average business density for ZIP Code 30216 is about 0.43 per square mile, but even if we assumed all 13 establishments are within the two square mile city of Flovilla, Flovilla's business establishment density would be about 6.5. Business establishment data are from U.S. Census Bureau, County Business Patterns/ZIP Code Business Patterns (2009), *available at* ftp://ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip (last visited Aug. 13, 2012). The number of business establishments was normalized to square miles using U.S. Census Bureau data. U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012). Establishment density was calculated by summing the establishment counts across the set of ZIP codes that approximate the geographic extent of the city of Atlanta, GA and dividing by the total area of the ZIP code set.

29. *Proxies for Competitive Showings*. For the sake of administrative convenience, the Commission adopted proxies for competition designed to allow price cap LECs to make the required showings, "with a minimum of administrative burden for the industry and the Commission."[87] Specifically, the Commission chose to "rely on collocation as a proxy for irreversible, sunk investment" in special access facilities and services.[88] Collocation – as used in the competitive showing rules – is an offering by an incumbent LEC whereby a requesting telecommunications carrier's transmission equipment is located, for a tariffed charge, at the incumbent LEC's central office.[89] The Commission predicted that collocation by competitors in incumbent LEC wire centers would be a reliable indicator of competition because collocation typically represented a financial investment by a competitor to establish facilities within a wire center.[90] The Commission predicted that the collocation-based competitive showings would "provide a bright-line rule to guide the industry" and "an administratively simple and readily verifiable mechanism for determining whether competitive conditions warrant the grant of pricing flexibility."[91]

30. The Commission established bright line "triggers" based on the extent of collocation within an MSA that it expected would allow a price cap LEC to demonstrate that market conditions in a given MSA would warrant relief. Specifically, the Commission held that price cap LECs would need to demonstrate

> either that (1) competitors unaffiliated with the incumbent LEC have established operational collocation arrangements in a certain percentage of the incumbent LEC's wire centers in an MSA, or (2) unaffiliated competitors have established operational collocation arrangements in wire centers accounting for a certain percentage of the incumbent LEC's revenues from the services in question in that MSA. In both cases, the incumbent also must show, with respect to each wire center, that at least one collocator is

[87] *Pricing Flexibility Order*, 14 FCC Rcd at 14258, para. 69.

[88] *Id.* at 14280, para. 104 (finding it reasonable to utilize collocation as a proxy for sunk investment in channel terminations); *id.* at 14273-74, paras. 93-94 (utilizing collocation as a proxy for sunk investment in dedicated transport and special access services other than channel terminations).

[89] *Id.* at 14265, para. 81 ("The Commission adopted these collocation rules, with only minor modifications, to implement the collocation requirements of section 251(c)(6) of the Act."); *see also Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730, 18736, para. 6 (1997) (*Expanded Interconnection Order*); 47 C.F.R. § 51.5 (2012). *See also* 47 U.S.C. § 251(c)(6). In a physical collocation arrangement, the requesting carrier has access to the leased space to install, maintain, and repair their own equipment, which is usually caged off from the incumbent LEC's equipment. *Expanded Interconnection Order*, 12 FCC Rcd at 18736, para. 6; 47 C.F.R. § 51.5. In a virtual collocation arrangement, the incumbent LEC buys or leases equipment at the requesting carrier's direction, and installs, maintains, and repairs the equipment itself; the requesting carrier can only monitor the equipment from offsite. *Expanded Interconnection with Local Telephone Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5163-64, para. 25 (1994); 47 C.F.R. § 51.5. We note that the term "collocation" can also be used to describe a situation where carriers and other service providers choose to place their facilities in the same location without recourse to the Act. *See, e.g., Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support,* WC Docket Nos. 10-90, 05-337, GN Docket No. 09-51, 25 FCC Rcd 6657, 6844 (2010) ("Internet gateway sites are assumed to be located in regional carrier collocation facilities (known commonly as 'carrier hotels."); Harry Newton, *Newton's Telecom Dictionary* 209-10 (23d ed. 2007) (defining "carrier hotel").

[90] *Pricing Flexibility Order*, 14 FCC Rcd at 14265-67, paras. 81-82.

[91] *Id.* at 14267-76, paras. 84, 96.

relying on transport facilities provided by a transport provider other than the incumbent LEC.[92]

The specific level of collocation required varies depending on whether a price cap LEC is seeking Phase I or Phase II relief and whether it is seeking relief for channel terminations or other special access services.[93]

31. On February 2, 2001, the U.S. Court of Appeals for the D.C. Circuit upheld the *Pricing Flexibility Order*, finding that the Commission made a reasonable policy determination and sufficiently explained its basis for adopting the competitive showing requirements.[94]

B. Subsequent Evidence Undermines the Commission's Previous Decision to Measure Competitive Showings and Grant Relief on an MSA-Wide Basis and Justifies Suspension of Rules

1. Original Rationale for Granting Pricing Flexibility in MSAs and Non-MSA Portions of Study Areas

32. The Commission's 1999 *Pricing Flexibility Order* chose MSAs as the basis for competitive analysis because the record at the time indicated "that MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition."[95] The Commission rejected larger geographic areas such as states and LATAs "[b]ecause competitive LECs generally do not enter new markets on a statewide basis."[96] Accordingly, "granting pricing flexibility over such a large geographic area would increase the likelihood of exclusionary behavior by incumbent LECs, by granting them flexibility in areas where competitors have not yet made irreversible investment in facilities."[97]

33. The Commission rejected concerns from some parties that "competition may exist in only a small part of an MSA," finding that "[t]he triggers we establish . . . are sufficient to ensure that competitors have made sufficient sunk investment within an MSA."[98] The Commission therefore rejected

[92] *See id.* at 14261-62, 14296, paras. 77, 141.

[93] To obtain Phase I relief for interstate special access services other than channel terminations between a LEC end office and an end user's customer premises, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 30 percent of the LEC's revenues from these services within the MSA. To obtain Phase I pricing flexibility for channel terminations between a LEC end office and a customer premises, the LEC must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within the MSA. 47 C.F.R. §§ 69.709, 69.711; *Pricing Flexibility Order*, 14 FCC Rcd at 14235-36, 14273-77, paras. 24, 93-99. To obtain Phase II relief for special access services other than channel terminations to end users, the trigger thresholds are unaffiliated collocation in 50 percent of the LEC's wire centers or in wire centers accounting for 65 percent of the LEC's revenues from these services within the MSA. For channel terminations to end users, the Phase II thresholds are unaffiliated collocation in 65 percent of the LEC's wire centers or in wire centers accounting for 85 percent of the LEC's revenues for these services. 47 C.F.R. §§ 69.709, 69.711; *Pricing Flexibility Order*, 14 FCC Rcd at 14235, 14298-300, paras. 25, 146-52.

[94] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 452 (D.C. Cir. 2001).

[95] *Pricing Flexibility Order,* 14 FCC Rcd at 14260, para. 72.

[96] *Id.* The Commission noted that many LATAs include an entire state. *Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 73.

[97] *Id.* at para. 72.

[98] *Id.* at para. 74.

smaller geographies, such as wire centers, concluding that "the record does not suggest that this level of detail justifies the increased expenses and administrative burdens associated with these proposals."[99]

34. The Commission received little guidance from commenters on how to establish an appropriate geographic area for grants of pricing flexibility in areas that fall outside of MSAs.[100] In the absence of such guidance, the Commission allowed price cap LECs to make a competitive showing for the entirety of the non-MSA portions of a study area for which they sought relief. It decided against requiring competitive showings at a more granular level – such as on a rural service area (RSA) basis,[101] stating that

> . . . .we expect competitors to enter MSA markets first and then to extend their networks into less densely populated areas. Because rural areas by definition do not have large concentrations of population comparable to urban areas, we expect that competitive entry into rural areas will be less concentrated than in urban areas. Therefore, we do not expect that pricing flexibility will enable an incumbent to engage successfully in exclusionary pricing behavior with respect to one RSA because competitive entry is limited to another RSA.[102]

The Commission therefore placed more weight on administrative ease, and chose to allow price cap LECs to apply for pricing flexibility for the entirety of the non-MSA components of a study area.[103]

2. The Record Now Suggests that Entry Occurs in Smaller Areas

35. The record in this proceeding suggests that, contrary to the Commission's prediction in 1999, MSAs have generally failed to reflect the scope of competitive entry. Rather, in many instances, the scope of competitive entry has apparently been far smaller than predicted.

36. In the sections that follow, we evaluate whether record evidence supports the Commission's prediction that MSAs and non-MSA sections of incumbent LEC study areas best reflect the scope of competitive entry. Entry is one of the many elements the Commission and antitrust agencies analyze when evaluating competition.[104] As a general principle, firms are likely to enter a geographic area to

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[99] *Id.*

[100] *Pricing Flexibility Order,* 14 FCC Rcd at 14261, para. 76.

[101] In the *Pricing Flexibility Order*, the Commission noted that "the non-MSA part of a study area comprises one or more rural service areas (RSAs), as defined in Section 22.909(b) of the Commission's rules." *Id.* at 14261, para. 76 n.202. Section 22.909(b) of the Commission's rules defines RSAs as the "428 areas, other than MSAs, established by the FCC" and listed in the *1992 MSA/RSA Public Notice*. 47 C.F.R. § 22.909(b).

[102] *Pricing Flexibility Order*, 14 FCC Rcd at 14261, para. 76.

[103] *Id.*

[104] The FTC and the Department of Justice evaluate entry in merger analysis and Commission orders have referenced similar analyses. *See* U.S. Department of Justice & Federal Trade Commission, FTC/DOJ Horizontal Merger Guidelines at 2 (2010) (FTC/DOJ Horizontal Merger Guidelines), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf; *see also SBC/AT&T Merger Order*, 20 FCC Rcd at 18310-11, paras. 39-40 (competitive entry analyzed; divestiture required when entry deemed unlikely); *Motion of AT&T Corp. to Be Reclassified As A Non-Dominant Carrier*, FCC Docket No. 95-427, Order, 11 FCC Rcd 3271, 3293-3309, paras. 38-73 (1995) (*AT&T Domestic Non-Dominance Order*); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997) (*LEC Classification Order*), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999) (modifying dominant/non-dominant analyses in accordance with the antitrust agencies merger analyses).

compete "if the entrant generates sufficient revenue to cover all costs apart from the sunk costs of entry. Such entry succeeds in the sense that the entrant becomes and remains a viable competitor in the market."[105] In order to gauge whether entry would be profitable, firms are more likely to focus on areas with high demand for their services, relative to the cost of providing those services.[106] Our review of the evidence suggests that demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA. This leads us to conclude that competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry. This conclusion is confirmed by the available data, including the record of pricing flexibility grants since the Commission's 1999 Order, and data on subsequent competitive developments in these areas.[107]

a. Business Demand Varies Significantly Within MSAs

37. The Commission sought to define the geographic areas for which pricing flexibility requests would be considered "narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable."[108] Our analysis of business establishment density indicates that business demand can vary significantly across an MSA.[109] This suggests that competitive conditions within an MSA are also likely to vary significantly, since areas with higher demand tend to be more capable of supporting competition and are more attractive to potential entrants than low demand areas.[110] These data provide context for our analysis of evidence about grants of pricing

[105] *See* U.S. Department of Justice & Federal Trade Commission, FTC/DOJ Commentary on the Horizontal Merger Guidelines at 37-47 (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf; *see also* FTC/DOJ Horizontal Merger Guidelines at 29 (entry is likely "if it would be profitable"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17032, para. 77 (2003) (subsequent history omitted) ("a firm's decision to enter a market depends on whether the revenues it expects to obtain exceed the costs of entering and serving the market, factoring in the cost and risk of failure") (*Triennial Review Order*).

[106] For example, "it is much cheaper (all else being equal) to deploy a single cable to a 100-unit apartment building than 100 different cables to 100 farms." Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads* 65 (MIT Press 2005); Nuechterlein and Weiser also explain how entry in special access occurred exactly where quality-adjusted prices were well above costs and the density of demand was highest. *Id.* at 10-12, 65; *see also infra* paras. 48-55.

[107] *See infra* section III.2.a-III.3.

[108] *Pricing Flexibility Order*, 14 FCC Rcd at 14259-60, para. 71.

[109] The term "business establishment" is identical to the term "establishment" as defined by the U.S. Census Bureau: "A single physical location where business is conducted or where services or industrial operations are performed." United States Census Bureau, Statistics of U.S. Businesses, Definitions, http://www.census.gov/econ/susb/definitions.html (last visited Aug. 13, 2012); *see also* United States Census Bureau, Statistics of U.S. Businesses, How the Data are Collected, http://www.census.gov/econ/susb/methodology.html (last visited Aug. 13, 2012).

[110] Commenters note that competitors are drawn only to areas of concentrated special access demand. *See* SBC 2005 NPRM Comments, Attach. A, Decl. of Parley Casto (SBC Casto Decl.) at para. 12 ("demand for special access services is highly concentrated in a relatively small number of dense urban wire centers and ex-urban wire centers containing office parks and other campus environments. Indeed, more than **[REDACTED]** percent of SBC's special access demand in Phase II MSAs is concentrated in **[REDACTED]** percent of its wire centers. To meet this (continued….)

flexibility petitions and how competitive entry has occurred since adoption of the *Pricing Flexibility Order*.

38. The plots in Figures 1 and 2 below illustrate that business demand varies significantly within MSAs. They show the distribution of business establishment density by ZIP code in 12 of the sample of 24 MSAs for which we sought data in our voluntary data requests.[111] Figure 1 shows the six MSAs with the least variance in business establishment density across ZIP codes – Fayetteville, North Carolina; Johnstown, Pennsylvania; Phoenix, Arizona; Ocala, Florida; Greenville-Spartanburg, South Carolina; and Lima, Ohio.[112] The distributions show that, even within these relatively homogeneous MSAs, dense pockets of business establishments exist as well as areas in which business establishments are few and far between. Johnstown, Pennsylvania is an extremely concentrated example. In Johnstown, seventy-five percent of the ZIP codes (from the minimum observation, represented by an upside-down "T" shape, to the top of the box) are clustered near the bottom of the scale with densities close to zero, while the remaining twenty-five percent (from the top of the box to the maximum observation, represented by a "T" shape) are scattered along the vertical axis between about five establishments per square mile and 230 establishments per square mile. The most dense ZIP code (15901), which covers the central business district of Johnstown, is 23 times more dense than the average zip code in the area. Phoenix is much

(Continued from previous page)

demand, competitors have deployed myriad competitive facilities – including fiber connected directly to end-user premises – in markets across SBC's territory, particularly in dense, metropolitan areas and large campus environments. And while competitors have not build out to *every* end user location, their existing fiber networks generally are close enough to most of the businesses and other customers that use high-capacity services that it would be simple enough for them to reach those locations if demand warranted.") (emphasis in the original); *see also* Verizon 2007 PN Reply at 25-26 ("the vast majority of special access connections – both from incumbents and competitors – go to buildings with much more than one DS1 of demand . . . . Indeed, even the limited data GAO reviewed on competitive deployment reveal that CLECS already have extended competitive facilities to at least 25 percent of buildings *with two DS3s or greater demand*.") (emphasis added); tw / One Communications 2007 PN Comments at 13 (stating that for carriers like One Communications it is almost never possible to self-deploy a loop for a single DS3 level of service); XO *et al.* 2007 PN Reply at 23 (stating that competitors do not build laterals unless demand at a location exceeds 3 DS3s of capacity); *see also* Nuechterlein & Weiser, *supra* n.106**,** at 65.

[111] We based our analyses here on a set of 12 MSAs, six with the lowest variance in business density and six with the highest, selected from a list of 24 for which we requested data and information in two voluntary data requests in this proceeding. In those requests, we sought data for 24 MSAs (16 of which were studied by the Government Accountability Office ("GAO") in a report evaluating competition for special access services and eight MSAs representing different parts of the country serviced by smaller providers than those evaluated in the GAO study). *See Special Access Facilities Data Public Notice,* 25 FCC Rcd at 15161, Attach. C; *see also Special Access Competition Data Public Notice,* 26 FCC Rcd at 14022, Attach. A. We note that our analyses in paras. 37-41 are not based on data collected from those voluntary data requests. However, the analyses here are based on the same MSAs for which we sought data and information in the data requests.

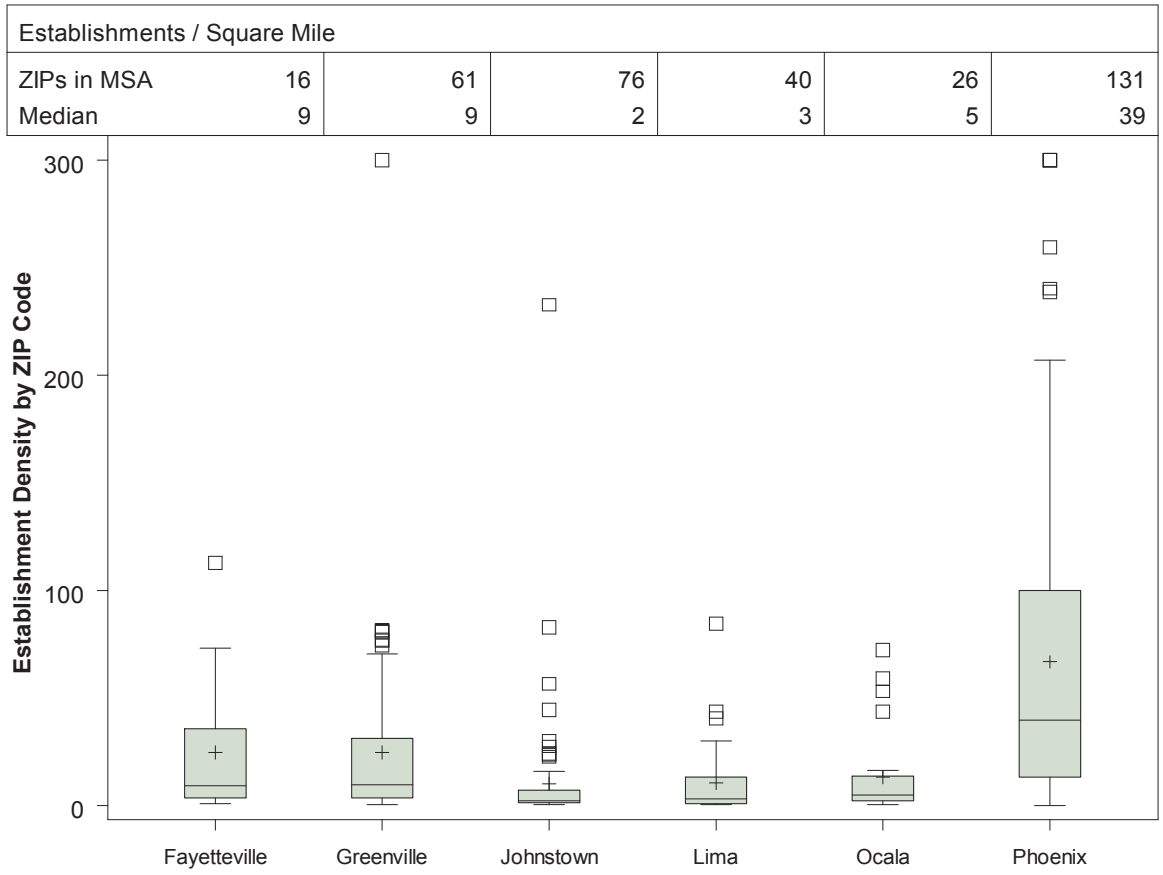
[112] Each "boxplot" ranks the ZIP codes in the MSA by establishment density then places the lowest 25 percent of the ZIP codes between the minimum observation and the bottom of the box (Q1); the next 25 percent between the bottom of the box and the horizontal line (the median) that divides the box in two; the next 25 percent between the horizontal line and the top of the box (Q3); and finally the top 25 percent between the top of the box and the maximum observation. The vertical distance covered by each of the four sections of the plot represents the dispersion of establishment densities such that a small distance means that the densities are nearly identical and a large distance means that ZIP codes are diverse in terms of establishment density. The "+" sign on the boxplots represents the average (as opposed to the median). Business establishment data are from U.S. Census Bureau, County Business Patterns / ZIP Code Business Patterns (2009), *available at* ftp://ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip (last visited Aug. 13, 2012). The number of business establishments was normalized to square miles using U.S. Census Bureau data. U.S. Census Bureau data. U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012).

larger and somewhat more uniform than Johnstown, but is nonetheless characterized by a few very dense ZIP codes amid a majority of less dense ZIP codes: while the Phoenix MSA has three ZIP codes with over 300 establishments per square mile, over half of the ZIP codes in the MSA have fewer than 40 establishments per square mile. Overall, these MSAs are similar in that a small number of ZIP codes are far more dense than the rest.

39. The distributions shown in Figure 2 demonstrate more extreme examples of intra-MSA variance of competitive conditions. Figure 2 depicts business establishment density variation for the six MSAs with the most business establishment density variation across ZIP codes: Chicago, Illinois; New Orleans, Louisiana; New York, New York; Seattle-Everett, Washington; Washington, DC; and Los Angeles, California.[113] Except for New York, half of the ZIP codes in each MSA contain fewer than 100 establishments per square mile, whereas other areas within each MSA have upwards of 1,000 establishments per square mile.

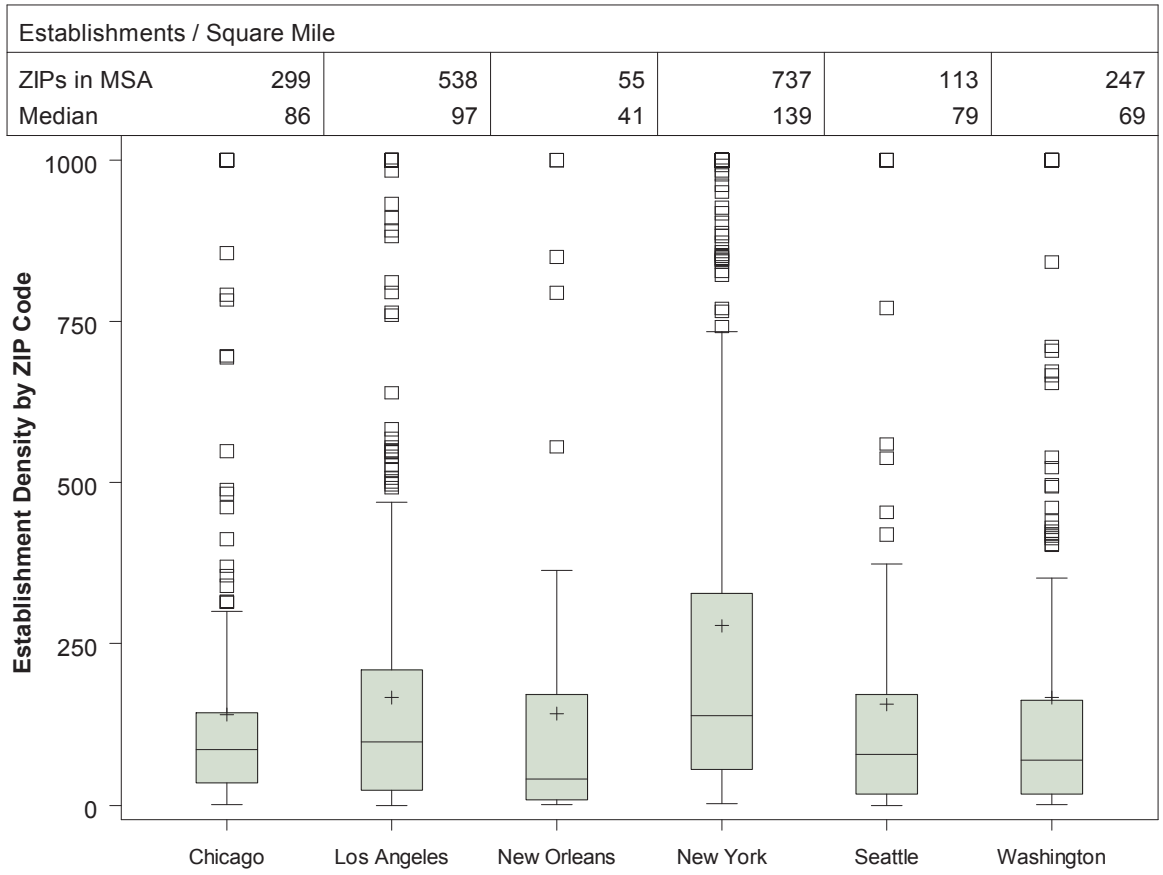
[113] Again, out of the 24 MSAs used in our voluntary data requests, these were the six with the highest business establishment density. *See supra* n.111. The full name of the New York MSA is the "New York, NY-NJ/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ" MSA, of the Washington, DC MSA is the "Washington, DC-MD-VA" MSA, and the Los Angeles, California MSA is the "Los Angeles-Long Beach/Anaheim-Santa Ana-Garden Grove/Riverside-San Bernadino-Ontario, CA" MSA. *1992 MSA/RSA Public Notice*, 7 FCC Rcd at 742-43.

Figure 1
Distribution of Business Establishment Densities by MSA and ZIP Code
Sample Small Metropolitan Areas



Note: Each box plot shows the distribution of establishment densities in ZIP codes within each Metropolitan Area. The + denotes the average establishment density taken across all ZIP codes in the MSA; ⊥ is the minimum observation above Q1-1.5(Q3-Q1); T is the maximum observation below Q3+1.5(Q3-Q1); and □ is a data point beyond Q1-1.5(Q3-Q1) or Q3+1.5(Q3-Q1). Densities above 300 establishments per square mile were topcoded to 300
Sources: U.S. Census Bureau, ZIP-Code Business Patterns: 2009; U.S. Census Bureau, ZIP Code Tabulation Areas, 2010.

Figure 2
Distribution of Business Establishment Densities by MSA and ZIP Code
Sample Large Metropolitan Areas



Note: Each box plot shows the distribution of establishment densities in ZIP codes within each Metropolitan Area. The + denotes the average establishment density taken across all ZIP codes in the MSA; ⊥ is the minimum observation above Q1-1.5(Q3-Q1); T is the maximum observation below Q3+1.5(Q3-Q1); and □ is a data point beyond Q1-1.5(Q3-Q1) or Q3+1.5(Q3-Q1). Densities above 1,000 establishments per square mile were topcoded to 1,000
Sources: U.S. Census Bureau, ZIP-Code Business Patterns: 2009; U.S. Census Bureau, ZIP Code Tabulation Areas, 2010.

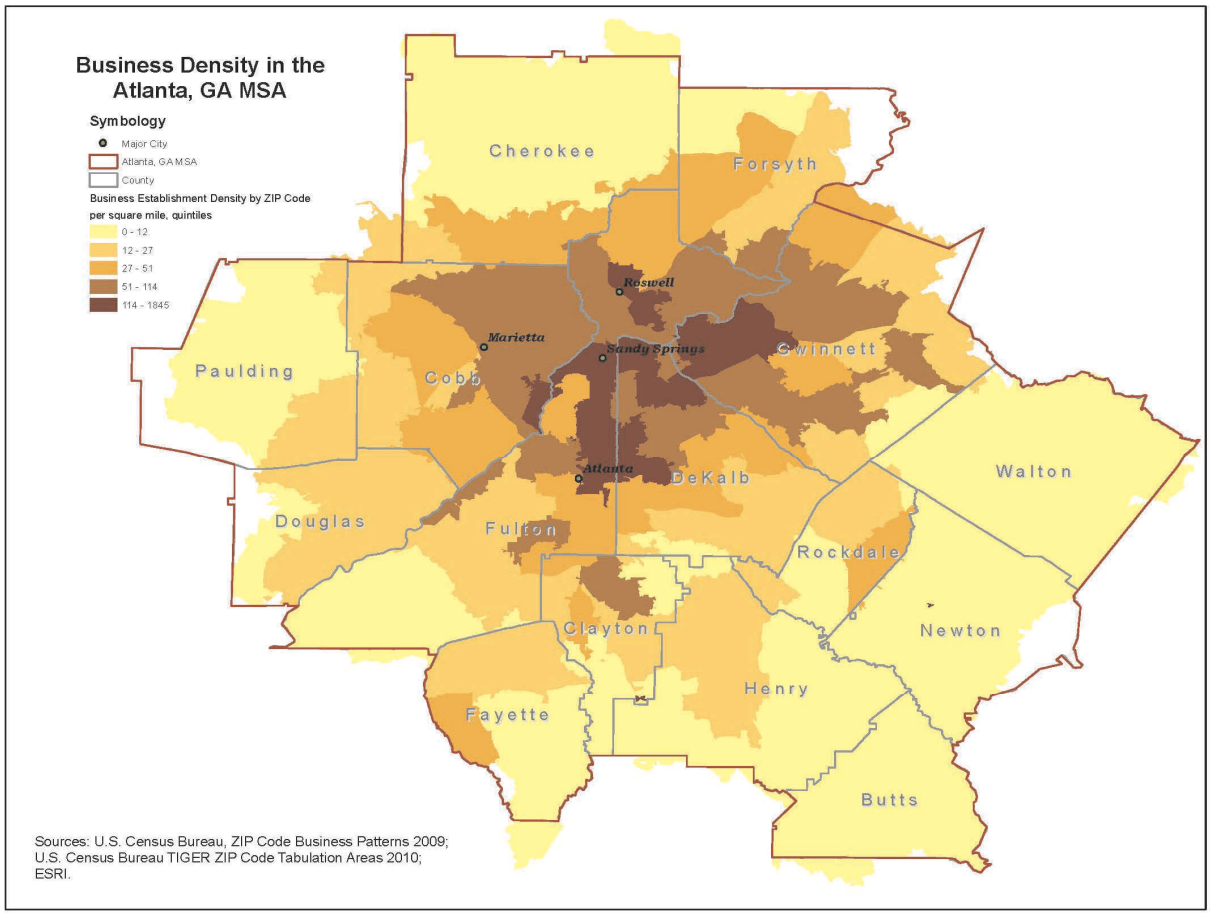
40. This variance of competitive conditions within an MSA is an artifact of the way MSAs are defined.[114] The resulting statistical entity can be large, including the entirety of distant counties if those counties contain exurban areas linked to the core by commuting behavior. The Atlanta, Georgia MSA, for example, includes Butts County, Georgia (see Figure 3 below). Of the three ZIP codes within that county, the densest (Jackson, Georgia 30233) has on average about 2.3 business establishments per square mile.[115] This contrasts to the density level of the central business district of Atlanta's MSA, which contains thousands of business establishments per square mile.[116] This kind of variation is common across the 12 MSAs we have examined for these purposes.

[114] *See supra* para. 26.

[115] *See* U.S. Census Bureau, *supra* n.112. ZIP code 30233 covers about 156 square miles and contains 357 business establishments.

[116] *See* U.S. Census Bureau, *supra* n.112. ZIP code 30303, for example, in the center of Atlanta, covers about one square mile yet has over 1,600 business establishments.

Figure 3
Business Density in the Atlanta, GA MSA



41. Given the foregoing evidence that MSAs do not have "reasonably similar" competitive conditions across their geographic areas, and as discussed fully below, when such competitive conditions are considered together with the evidence of how relief has been granted and how some competitive entry has occurred, we can no longer conclude that MSAs "best reflect the scope of competitive entry" by LECs.[117]

b. Prior Grants of Relief Suggest that Competitive LEC Entry Occurred at a Smaller Geographic Level than the MSA

42. Though the Commission acknowledged that demand for special access services might be concentrated in certain areas, it designed the competitive showings with the intent of ensuring that price cap LECs could not obtain pricing flexibility throughout an MSA in instances of extremely concentrated demand. While recognizing that "a few wire centers may account for a disproportionate share of revenues for a particular service," the Commission attempted to set its revenue based collocation triggers at levels designed to "ensure that competitors have extended their networks beyond a few revenue-intensive wire centers."[118] Our analysis indicates that the 1999 rules have not effectively fulfilled this

[117] *Pricing Flexibility Order*, 14 FCC Rcd at 14259, para. 71.

[118] *Id.* at 14276-77, paras. 97-98.

intent. This provides further evidence that MSAs likely do not reflect the actual scope of competitive entry.

43. As noted above, the Commission adopted two types of rules by which price cap LECs could make the competitive showings required to obtain relief. The first type of rule permitted price cap LECs to obtain relief by showing the presence of collocators in a certain percentage of its wire centers within an MSA.[119] The second type, the revenue-based rule described above, reflected the Commission's concession that demand for special access services is often concentrated.[120] Despite this concession, however, the Commission cautioned that the revenue-based threshold for dedicated transport services would need to be set high enough "to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers."[121] With respect to channel terminations to end users, which the Commission noted were less competitive than dedicated transport, it doubled the revenue requirement for limited pricing flexibility and increased by almost a third the requirement for full relief.[122] In short, the Commission made the revenue-based rule more difficult to meet specifically to protect against grants of pricing flexibility based on extremely concentrated demand.

44. We have analyzed the 217 incumbent LEC areas for which pricing flexibility relief for channel terminations to end users was granted by order of the Bureau, representing all such grants associated with pricing flexibility petitions available in the Commission's Electronic Tariff Filing System. These grants cover 199 MSAs and five non-MSAs.[123] The majority of those grants were based exclusively on the revenue-based rule.[124] Because the revenue-based rule has different revenue thresholds for each type of special access service, the Commission restricted its analysis to one type, channel terminations to end users, to keep the analysis consistent.

45. This analysis shows that our rules permitted MSA-wide relief on the basis of extremely concentrated demand in many instances. For example, as detailed in the chart below, 72 of the 212 grants for MSAs were based on revenues of no more than a quarter of the relevant wire centers within the MSA.[125] For example, AT&T obtained Phase II pricing flexibility in the Pensacola MSA based on the revenues of three out of 12 wire centers.[126] Further, 30 of those 72 grants were based on the revenues of

[119] *See* 47 C.F.R. §§ 69.709(b), (c); 69.711(b), (c).

[120] *See supra* para. 30; 47 C.F.R. §§ 69.709(b), (c), 69.711(b), (c).

[121] *Pricing Flexibility Order,* 14 FCC Rcd at 14277, para. 98.

[122] The revenue threshold for Phase I pricing flexibility for dedicated transport services is 30 percent, and for Phase II its 65 percent. 47 CFR § 69.709(b)(2), (c)(2). For channel terminations, the thresholds are 65 percent and 85 percent, respectively. 47 CFR § 69.711(b)(2), (c)(2).

[123] We note that there are 204, rather than 217, areas for which pricing flexibility has been granted by order of the Bureau because multiple incumbent LECs have obtained overlapping grants of pricing flexibility in a number of MSAs. *See infra* Appendix D. We analyze the non-MSA grants in Section III.2.f, *infra.*

[124] Of the pricing flexibility grants made in MSAs, 180 were based exclusively on the revenue-based rule, two were based exclusively on the percentage-of-collocation rule, and 30 met the requirements of both types of competitive showings. Of the grants made in non-MSA areas, three were based exclusively on the revenue-based rule and two met the requirements of either type of showing. *See infra* Appendix D.

[125] *See infra* Appendix D. Under our rules, petitioners may meet revenue thresholds only by counting revenues from wire centers which have at least one collocator that is "using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center." *See* 47 C.F.R. §§ 69.709(b)(2), (c)(2); 69.711(b)(2), (c)(2). We analyze the non-MSA grants in Section III.2.f, *infra.*

[126] *See Petition of BellSouth Telecommunications, Inc. for Pricing Flexibility Under Section 69.727 of the Commission's Rules for Specific MSAs,* Petition for Pricing Flexibility and attachments, attach. 3 (filed Aug. 24, (continued….)

only one wire center, 12 were based on the revenues of only two, and 5 were based on the revenues of only three.

Table 4: MSA-Wide Grants Based on Extremely Concentrated Demand[127]

	Carrier Name		Competitive Showing		
MSA	Current	At Time of Grant	WCs With Collocation	Total WCs	% of Wire Centers with Collocation
Alexandria LA	AT&T	Bell South	1	10	10%
Anderson IN	AT&T	Ameritech	1	5	20%
Anderson SC	AT&T	Bell South	1	5	20%
Asheville NC	AT&T	Bell South	1	9	11%
Bangor, ME	Fairpoint	Verizon	1	14	7%
Burlington NC	AT&T	Bell South	1	5	20%
Columbus GA-AL	AT&T	Bell South	1	7	14%
Evansville IN-KY	AT&T	Bell South	1	4	25%
Evansville-Henderson IN-KY	AT&T	Ameritech	1	13	8%
Gainesville FL	AT&T	Bell South	1	6	17%
Harrisburg PA	CenturyLink	Sprint	1	14	7%
Jackson MI	AT&T	Ameritech	1	6	17%
Joplin MO	AT&T	SWBT	1	6	17%
Kalamazoo MI	AT&T	Ameritech	1	8	13%
Lawton OK	AT&T	SWBT	1	4	25%
Lima OH	CenturyLink	Embarq	1	16	6%
Medford, OR	CenturyLink	Qwest	1	7	14%
Memphis TN-AR-MS	AT&T	SWBT	1	5	20%
Muncie IN	AT&T	Ameritech	1	5	20%
Ocala FL	CenturyLink	Sprint	1	10	10%
Owensboro KY	AT&T	Bell South	1	9	11%
Panama City FL	AT&T	Bell South	1	5	20%
Pittsburgh PA	CenturyLink	Sprint	1	14	7%
Pueblo CO	CenturyLink	Qwest	1	5	20%
Salem OR	CenturyLink	Qwest	1	7	14%
Sioux City IA-NE	CenturyLink	Qwest	1	8	13%
St. Cloud, MN	CenturyLink	Qwest	1	8	13%
St. Joseph MO	AT&T	SWBT	1	5	20%
Waco TX	AT&T	SWBT	1	14	7%

(Continued from previous page)
2000); *see also BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services,* CCB/CPD File No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (2000).

[127] This chart is based on an analysis of 212 grants of pricing flexibility for channel terminations to end users. It represents grants made for either Phase I or Phase II pricing flexibility. *See generally* Appendix D.

MSA	Carrier Name		Competitive Showing		
	Current	At Time of Grant	WCs With Collocation	Total WCs	% of Wire Centers with Collocation
Waterloo-Cedar Falls, IA	CenturyLink	Qwest	1	6	17%
Battle Creek MI	AT&T	Ameritech	2	8	25%
Boise City, ID	CenturyLink	Qwest	2	8	25%
Clarksville-Hopkinsville TN/KY	AT&T	Bell South	2	12	17%
Eugene-Springfield, OR	CenturyLink	Qwest	2	13	15%
Fargo-Moorehead, ND-MN	CenturyLink	Qwest	2	8	25%
Fort Smith AR-OK	AT&T	SWBT	2	11	18%
Manchester NH	Frontier	Verizon	2	13	15%
Oxnard-Simi Valley-Ventura CA	AT&T	Pac Bell	2	9	22%
Provo-Orem UT	CenturyLink	Qwest	2	10	20%
Springfield IL	AT&T	Ameritech	2	11	18%
Springfield MO	AT&T	SWBT	2	12	17%
Wilmington NC	AT&T	Bell South	2	8	25%
Augusta GA	AT&T	Bell South	3	13	23%
Bloomington-Normal, IL	Frontier	Verizon	3	20	15%
Chattanooga TN-GA	AT&T	Bell South	3	13	23%
Pensacola FL	AT&T	Bell South	3	12	25%
Portland, ME	Fairpoint	Verizon	3	22	14%

46. In sum, more than a third of the cases in which pricing flexibility was granted were premised on the existence of collocations where 65 percent or more of the special access revenue generated within the MSA came from 25 percent or fewer of the wire centers in the MSA. This is consistent with extreme variations in business density. Qualitatively, this suggests that MSA-wide grants of pricing flexibility have encompassed areas in which little or no competitive entry would be expected.

47. Even with more relaxed standards for what constitutes extremely concentrated demand, the data shows that 97 grants were based on revenues from less than a third of the wire centers, and 144 were based on revenues from less than half of the wire centers. Conversely, only 28 grants were based on revenues of two-thirds or more of the wire centers within the applied-for MSA.[128]

c. Data indicates that Competitive LEC entry occurs only in areas of high business demand

48. Whereas our bright-line competitive showings suggested that some MSAs would soon be, or already were, competitive more than a decade ago, recent data indicates that competitors have a strong tendency to enter in concentrated areas of high business demand, and have not expanded beyond those areas despite the passage of more than a decade since the grant of Phase II relief. This provides further evidence that an MSA is probably a much larger area than a competitor would typically choose to enter.

49. For example, data about the Atlanta MSA, where BellSouth was granted Phase II relief in 2000, demonstrates the importance of geographic business establishment density as a driver of

[128] *See infra* Appendix D.

competitive entry.[129] In 2011, staff collected data, on a voluntary basis, about the presence of competitive special access facilities for channel terminations to end users in 24 MSAs.[130] The following providers submitted data indicating that they provide facilities-based competition in parts of the Atlanta MSA: **[REDACTED]**. The first of these carriers is **[REDACTED]**, another is the **[REDACTED]**, and three are among the nation's **[REDACTED]**. According to those data, only 40 percent of the ZIP codes in the Atlanta MSA had competitive access facilities supplied by even one of the **[REDACTED]** reporting competitors.[131]

50. The ZIP codes in which the reporting carriers in Atlanta offered facilities-based competition were those with the highest average business establishment densities. This is reflected in Table 5, which compares average business establishment density between ZIP code areas in which reporting carriers compete and ZIP codes areas in which they do not (and includes similar data for the Miami and Norfolk MSAs).[132] Because the data submissions that serve as the basis for Table 5 were voluntary, the reporting competitors do not necessarily represent all competition in the three MSAs discussed above, and it is possible that competitors have higher market shares than our data show. However, Table 5 does not show market shares, but rather the geographic breadth of coverage by competitors within the MSA. Further analysis of these data indicates that the reporting carriers had a tendency to enter the same areas within the MSA.[133] We have no reason to believe that the competitors' focus on high business establishment density indicated by these data would change if we were able to obtain data from any other competitive providers with access facilities in the Atlanta, Miami and Norfolk MSAs.[134] Thus, despite the fact that our competitive showings rules were designed to predict competitive entry across an MSA, these data

[129] *Petition of BellSouth Telecommunications, Inc. (BellSouth) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and attachments, attach. 3 (filed Aug. 24, 2000); *see also BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (Common Carrier Bur. 2000).

[130] The data was responsive to the *Special Access Facilities Public Notice*, which focused exclusively on facilities-based competition for channel terminations to end users. *See Special Access Facilities Data Public Notice,* 25 FCC Rcd at 15146; *see also Special Access Facilities Data Request Clarification,* 25 FCC Rcd at 17693.

[131] *See* **[REDACTED]**; U.S. Census Bureau data. U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012).

[132] Here, business establishment density is computed by averaging the densities of each ZIP code served by reporting carriers other than the incumbent LEC and areas that are not served (*i.e.,* summing the densities of each ZIP code and dividing that number by the number of ZIP codes). We conducted the analysis at the level of the ZIP code because this was the smallest geographic unit for which business establishment data were available from the U.S. Census. We selected these MSAs from the 24 for which data were requested in the *Special Access Facilities Data Public Notice* based on whether a carrier in that MSA had Phase II pricing flexibility, the length of time since Phase II pricing flexibility had been granted (we selected MSAs which had Phase II for the longest amount of time), and whether the MSAs were largely served by the single incumbent LEC that had obtained Phase II pricing flexibility.

[133] **[REDACTED]**.

[134] *See infra* paras. 52-57. Moreover, we note that AT&T recently submitted maps of competitive fiber in many of the same MSAs in which we collected data, using data from a commercial database. Letter from David L. Lawson, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Exh. B (Geotel Report CLEC Fiber Routes and Wire Centers for Atlanta, Chicago, Detroit, Greenville (SC), Los Angeles, Miami and New Orleans MSAs) (AT&T June 20 *Ex Parte* Letter). Though AT&T notes that the database may understate the amount of facilities-based competition, it is likely that the commercial database includes data from carriers who did not respond to our voluntary data request. Those database-based maps appear to show that competitors build out in many of the same areas within the MSA as the areas in which carriers who responded to our data request chose to build facilities.

suggest a strong tendency for competitive LECs to deploy channel termination facilities to end users only in ZIP codes with the highest density of business establishments.[135]

Table 5: Average Business Establishment Density in MSAs by ZIP Codes With vs. Without Facilities-Based Competition from Reporting Carriers[136]

MSA and Status of Incumbent Provider	Number of ZIP Codes in MSA with Reported Facilities-Based Competition	% of ZIP Codes in MSA With Reported Facilities-Based Competition[137]	Average Establishment Density in ZIP Codes with Reported Facilities-Based Competition (Units: Estab. Per Square Mile)	Average of Establishment Density in ZIP Codes Without Reported Facilities-Based Competition (Units: Estab. Per Square Mile)
Atlanta, GA (2000 AT&T/BellSouth Phase II Pricing Flexibility)	59	40%	175	41
Miami, FL (2000 AT&T/BellSouth Phase II)	41	31%	390	181
Norfolk, VA[138] (2001 Verizon Phase II)	36	78%[139]	106	59

[135] *See* **[REDACTED]**; U.S. Census Bureau, County Business Patterns/ZIP Code Business Patterns (2009), *available at* ftp://ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip (last visited Aug. 13, 2012); U.S. Census Bureau data, U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012).

[136] Again, we note that the data for this table comes from responses to the *Special Access Facilities Public Notice*, which focused exclusively on facilities-based competition for channel terminations to end users, combined with data from the U.S. Census Bureau. *See* **[REDACTED]**; U.S. Census Bureau, County Business Patterns/ZIP Code Business Patterns (2009), *available at* ftp://ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip (last visited Aug. 13, 2012); U.S. Census Bureau data, U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012).

[137] This column represents the percentage of ZIP codes in the MSA served by reporting carriers.

[138] Though the Norfolk MSA includes Currituck, North Carolina, the analysis here only focuses on those ZIP codes in the Norfolk MSA within Virginia's borders. *See 1992 MSA/RSA Public Notice* (listing the component counties and cities of the Norfolk MSA).

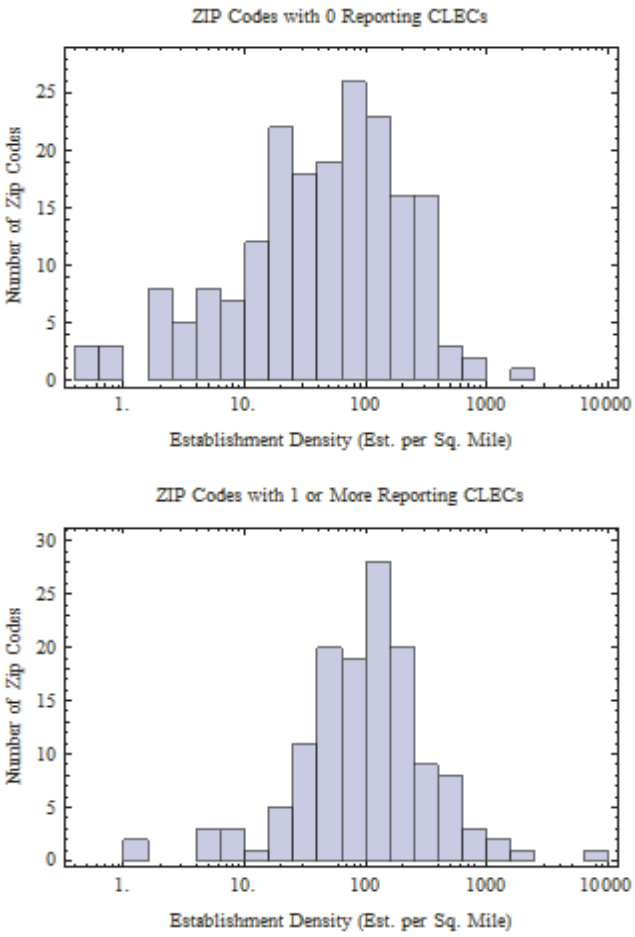
[139] The Norfolk, Virginia, MSA has a high percentage of ZIP codes with competitive access to channel terminations largely due to reporting by a single carrier.

51. Chart 6 displays the distribution of establishment density for ZIP codes in the three MSAs of Table 5. The distribution at the top of Chart 6 is for ZIP codes in which no reporting carrier offered facilities-based competition for end-user channel terminations and the distribution at the bottom is for ZIP codes in which one or more reporting carriers did offer facilities-based competition for end-user channel terminations. The chart indicates that the reporting carriers had a greater tendency to offer competition in ZIP codes with business establishment density greater than 100 establishments per square mile than they did in ZIP codes with lower establishment densities. Based on an analysis of the individual ZIP code areas, the probability that the carriers' location decisions in these metropolitan areas were not tied to business establishment density is exceedingly small.[140] The findings from this analysis are consistent with other evidence in the record.[141]

[140] The distribution of establishment densities among the 136 ZIP code areas with competitive LEC entry by the reporting carriers was compared to the distribution of establishment densities among the 192 ZIP code areas with no competitive LEC entry by the reporting carriers. The mean and median of the "competitive LEC entry" distribution were both greater than those of the "no competitive LEC entry" distribution. A formal statistical test (the Mann-Whitney test) concluded that the probability of the two distributions being equal was only 0.000001. *See supra* n. 133. This means that our statistical analysis shows that there is an extremely low likelihood that the distribution of establishment densities in ZIP codes with CLEC entry would be the same as ZIP codes without CLEC entry. Since ZIP code areas with entry by the reporting carriers had higher establishment densities than those with no entry and this difference is large enough not to be random, we conclude that establishment density was likely a factor in the decision for a CLEC to enter an area. *See* **[REDACTED]**; *see also* U.S. Census Bureau, County Business Patterns/ZIP Code Business Patterns (2009), *available at* ftp:///ftp.census.gov/econ2009/CBP_CSV/zbp09totals.zip (last visited Aug. 13, 2012); U.S. Census Bureau, ZIP Code Tabulation Areas (2010), http://www.census.gov/geo/ZCTA/zcta.html (last visited Aug. 13, 2012); Robert V. Hogg & Allen T. Craig, *Introduction to Mathematical Statistics* 371 (3d ed. 1970).

[141] *See infra* paras. 53-55 (competitive entry does not occur throughout an MSA, but is clustered in specific areas of high demand), 68-71(providing evidence that facilities buildout by competitive special access providers is very limited).

Chart 6: Distributions of Zip Code Business Establishment Densities By Competitive LEC Entry for Atlanta, Miami, and Norfolk MSAs



52. The fact that there may be other competitors in these MSAs that are not reflected in our data, that more competitors may enter in the future, or that current competitors may build out to other parts of the MSA with high business density does not diminish our finding that competitors typically enter in areas of high business establishment density. Commenters rightly point out that we do not have comprehensive facilities data for the MSAs above.[142] We recognize the limitations of our existing data set and, as described below, we intend to collect additional data in the coming months that will help inform our analysis. However, even this partial data provides insight into where competitors choose to enter within an MSA, and reinforces evidence we have received in this record.[143]

53. Incumbent LECs generally concede that competitors have focused on areas in which demand for special access services is very concentrated. As SBC noted:

[142] *See, e.g.*, AT&T 2009 PN Comments at 8, 39-44; Verizon 2009 PN Comments at 34-36; Qwest 2009 PN Reply at 22-23; Letter from Glenn Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Apr. 27, 2009).

[143] While we cannot rely on this data as conclusive nationwide evidence at this time, *see infra* para. 71**,** the responses are illustrative of trends we have observed in the market and are the best data available to test the viability of the Commission's predictions in the *Pricing Flexibility Order*.

> Demand for special access services is highly concentrated in a relatively small number of dense urban wire centers and ex-urban wire centers containing office parks and other campus environments. Indeed, more than **[REDACTED]** percent of SBC's special access demand in Phase II MSAs is concentrated in **[REDACTED]** percent of its wire centers. To meet this demand, competitors have deployed myriad competitive facilities – including fiber connected directly to end-user premises – in markets across SBC's territory, particularly in dense, metropolitan areas and large campus environments.[144]

Verizon states that more than 80 percent of demand is generated in 8 percent of its wire centers, "enabling competitors to address a large portion of demand through targeted investments."[145] This is consistent with the Commission's earlier finding that communities within an MSA share a center of commerce, but not necessarily common economic characteristics relating to telecommunications deployment.[146] This record also demonstrates that demand exists for special access services outside of these areas and it raises concerns regarding the availability of competitive alternatives to meet such demand.[147]

54. Some commenters also allege that extending new facilities is sufficiently easy that competitors could reach all parts of an MSA if warranted even if they only have facilities in part of an MSA today.[148] SBC, for example, states that a large percentage of its demand for DS1 and DS3 services runs within 1,000 feet, or about three city blocks, of existing alternative fiber.[149] Thus, incumbent LECs argue that potential competition exists throughout an MSA even if competitive facilities are only present in a small area. In contrast, competitive carriers assert that entry is far more difficult than incumbents describe in the record.[150] Such commenters state that, as compared to incumbent providers who have

[144] SBC Casto Declaration at para. 12. Though SBC further contends that competitors are "close enough to most of the businesses and other customers that use high-capacity services that it would be simple enough for them to reach those locations if demand warranted," this point is related to potential competition and discussed below. *See infra* para. 54; *see also infra* para. 100.

[145] Verizon 2005 NPRM Comments at 3.

[146] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 52, para. 82 (Feb. 4, 2005) (*TRRO)* ("MSAs are comprised of communities that share a locus of commerce, but not necessarily common economic characteristics as they relate to telecommunications facilities deployment … [Thus] competitive fiber consistently is located in and around the core business district of every major city – and not necessarily elsewhere. Due to the wide variability in market characteristics within an MSA, MSA-wide conclusions would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy.").

[147] *See infra* para. 55.

[148] *See* SBC Casto Decl. at para. 12 ("And while competitors have not build out to *every* end user location, their existing fiber networks generally are close enough to most of the businesses and other customers that use high-capacity services that it would be *simple* enough for them to reach those locations if demand warranted.") (emphasis added); *see also* Verizon 2007 PN Reply at 26 ("GAO's model, therefore, overestimates the number of buildings in which there is likely to be significant special access demand and fails to acknowledge that, given the marketplace reality of concentrated demand, competitors' facilities reach the majority of special access demand and *can easily be extended to reach the remainder*.") (emphasis added).

[149] SBC 2005 NPRM Comments at 13.

[150] *See, e.g.*, Sprint 2007 PN Comments at 24, n.75; tw telecom 2007 PN Comments at 13-14; BT Americas 2007 PN Comments at 5-6; Covad *et al.* 2007 Comments, Decl. of Ajay Govil at para. 9 (Covad *et al.* Govil Decl.); XO *et al.* 2007 PN Reply at 22-24; T-Mobile 2007 PN Reply at 4-5; XO 2005 NPRM Comments at 4; Nextel 2005 NPRM Reply at 14-15; tw telecom 2005 NPRM Reply at 8-10; Sprint 2007 PN Comments, Attachment 1, Declaration of Gary B. Lindsey (Sprint Lindsey Decl.) at para. 7.

achieved economies of scope and scale in the provision of telecommunications services, it is not economical for competitors to deploy their own facilities to serve all special access demand.[151] Competitive carriers note that construction costs, the costs of fiber and electronics, backhaul costs, transaction costs involved in negotiating with suppliers, and other recurring costs such as rent, utilities, and maintenance are typically too large to justify provisioning a building with relatively low levels of demand.[152] Covad and XO, for example, estimate the costs of deploying a building lateral to be **[REDACTED]**, and tw telecom estimates that **[REDACTED]**.[153] Commenters, including Covad, XO, BT Americas, and tw telecom, also point to important barriers to entry, including the delays in or impossibility of securing municipal franchise agreements, rights-of-way agreements, building access agreements, and building and zoning permits.[154]

55. We need not resolve this controversy here, however, for data provided by incumbent LECs demonstrate that, even if competitors could easily deploy fiber to serve customer demand within 1,000 feet of incumbents' facilities, many parts of an MSA would still not be served by competitive fiber. For instance, a 2007 AT&T map depicting competitive fiber deployment in the Austin, Texas MSA appears to indicate that, out of the 24 AT&T wire centers in the MSA, competitive fiber does not extend to **[REDACTED]**.[155] Maps submitted by SBC in 2005 provide similar data.[156] For instance, SBC estimates that in the San Diego MSA, **[REDACTED]**. This cuts against assertions that the majority of special access demand could be easily and quickly served by proximate competitive alternatives.[157]

d. Analysis of Multi-Incumbent LEC MSAs Also Suggests that MSAs Do Not Correspond to the Scope of Entry

56. As discussed above, the Commission selected the MSA because it decided the MSA best reflected the scope of competitive entry.[158] If our rules operated in a manner consistent with our predictions, it should follow that uniform relief would generally be granted when two or more price cap LECs operate in the same MSA. That has not proven to be the case. For example, in the Evansville, Indiana MSA, BellSouth has 4 wire centers and Ameritech has 13.[159] In 2001, Ameritech qualified for

[151] *See, e.g.*, T-Mobile 2007 PN Reply at 4-5; Nextel 2005 NPRM Reply at 15; Covad *et al.* Govil Decl. at para. 9.

[152] *See* BT Americas 2007 Comments at 5-6; Covad *et al.* Govil Decl. at para. 14; XO *et al.* 2007 PN Reply at 22-24; Sprint 2007 PN Comments at 24, n.75; tw telecom 2007 PN Comments at 14; XO 2005 NPRM Comments at 4; Sprint Lindsey Decl. at 3, para. 7.

[153] Covad *et al.* 2007 PN Comments at 22-23 & Covad *et al.* Govil Decl. at para. 16; tw telecom 2007 PN Comments at 13-14.

[154] BT Americas 2007 PN Comments at 5-6; Covad *et al.* 2007 PN Comments at 26 & Covad *et al.* Govil Decl. at 8-9; tw telecom 2005 NPRM Comments at 12; XO 2005 NPRM Comments at 4.

[155] AT&T 2007 Comments at Conf. Attach. to Castro Decl. (Fiber Maps). *See also infra* Appendix D at 70 (providing the number of wire centers in the Austin MSA).

[156] SBC 2005 NPRM Comments, Attach. 2 (Fiber Maps) (indicating that, among others, **[REDACTED]**).

[157] *See* SBC 2005 NPRM Comments at 13-14.

[158] *Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 72.

[159] *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for Specific MSAs*, Petition for Pricing Flexibility and Appendices, App. C at 14 (filed Nov. 17, 2000); *Petition of BellSouth Telecommunications, Inc. for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules*, Petition for Pricing Flexibility and Attachments, Attach. 3 at 1 (filed Aug. 2, 2002).

Phase I pricing flexibility.[160] In contrast, BellSouth met the higher competitive showings requirements for Phase II pricing flexibility one year later.[161] Likewise, in 2002, Verizon satisfied the requirements for Phase II pricing flexibility for its 2 wire centers in the Bridgeport-Stamford-Norwalk, Connecticut MSA.[162] Two years later, SNET was only able to get Phase I pricing flexibility, based on revenue of 9 out of its 22 wire centers in the same MSA.[163] In the total of 12 MSAs in which we granted pricing flexibility to more than one provider within the MSA, our data shows instances of inconsistent grants of pricing flexibility in nine.[164] These data reinforce our conclusion that competitive conditions can vary significantly across an MSA.

e. Billing Practices May Not Be Indicative of Competitive Entry

57. It is not clear, based on our existing record, that incumbent LEC billing practices lead to consistent pricing across an MSA. Commenters, in particular incumbent LECs, argue that special access pricing is generally not tied to a small geographic market, but rather pricing is uniform throughout an MSA or larger geographic region.[165] Thus, because tariffs typically encompass an MSA or larger geographic region, incumbents assert that prices are constrained across that whole area, regardless of the presence of competition in any individual location.[166] Such commenters also argue that it is administratively burdensome for the Commission to assess whether competition exists for granular geographic markets, and that it would be onerous for carriers to implement pricing flexibility for individual buildings or wire centers.[167] Thus, AT&T, for example, states that the current pricing

[160] *Petition of Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility*, CCB/CPD No. 00-26, *Petition of Pacific Bell Telephone Company for Pricing Flexibility*, CCB/CPD No. 00-23, *Petition of Southwestern Bell Telephone Company for Pricing Flexibility,* CCB/CPD No. 00-25, Memorandum Opinion and Order, 16 FCC Rcd 5889 (Common Carrier Bur. 2001).

[161] *See BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WBC/Pricing No. 02-24, Memorandum Opinion and Order, 17 FCC Rcd 23725 (Wireline Comp. Bur. 2002).

[162] *See Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, Memorandum Opinion and Order, 17 FCC Rcd 5359, 5371, para. 27 (Common Carrier Bur. 2002); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and Attachments, Attach. D (filed Nov. 29, 2001).

[163] *See Petition of Southern New England Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Hartford, et al., CT and Bridgeport, et al., CT MSA*, Petition for Pricing Flexibility and Appendices, App. C at 1 (filed Feb. 13, 2004); *Southern New England Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing No. 04-12, Memorandum Opinion and Order, 19 FCC Rcd 10298, 10305, para. 16 (Wireline Comp. Bur. 2004).

[164] As discussed above, our analysis of pricing flexibility grants was restricted to grants of pricing flexibility for channel terminations to end users.

[165] SBC 2005 NPRM Reply at 54; Verizon 2009 PN Reply at 22. Verizon states that it "offers discounts across broad geographic areas because this is consistent with the way that many customers purchase special access services. In addition, broad geographic discounts are also responsive to customer requests for discounts at every location where they purchase special access services." Letter from Donna Epps, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 at 5 (filed Aug. 16, 2010) (Verizon Aug. 16, 2010 *Ex Parte* Letter).

[166] AT&T 2009 PN Reply at 32-33; Qwest 2009 PN Comments at 28; SBC 2005 NPRM Reply at 55; Verizon 2005 NPRM Comments at 44-45. For example, AT&T notes that "[t]o the extent transport costs may be higher in rural areas, that is a consequence of the longer distances and lower population densities in those areas – the per-mile pricing of special access is almost always uniform throughout an MSA." AT&T 2009 PN Reply at 32.

[167] AT&T 2009 PN Comments, Exh. A, Decl. of Dennis W. Carlton & Hal S. Sider (AT&T Carlton / Sider Decl.) at para. 19; AT&T 2009 PN Reply at 31-32; SBC 2005 NPRM Reply at 54-56; Verizon 2009 PN Reply at 24, 26; *see* (continued….)

flexibility rules strike "a reasonable balance between the costs and benefits of identifying with greater granularity those geographic areas where LECs face competition from rivals with sunk investments and the administrative manageability of pricing flexibility rules."[168]

58. There also is evidence, however, that incumbent LEC billing practices may not be uniform across MSAs. Price cap LECs have the authority to set prices in zones within an MSA or the non-MSA portions of a study area.[169] In the *Pricing Flexibility Order*, the Commission amended Section 69.123 of its rules to permit incumbent price cap LECs to deaverage geographically their rates for access services in the trunking basket, and to allow price cap incumbent LECs to define the scope and number of density zones.[170] The Commission noted that "averaging across large geographic areas distorts the operation of markets in high-cost areas because it requires incumbent LECs to offer services in those areas at prices substantially lower than their costs of providing those services."[171] However, by granting incumbent LECs the flexibility to "choose the number of zones and the criteria for establishing zone boundaries, they are more likely to establish reasonable and efficient pricing zones."[172] The record indicates that price cap LECs do, in at least some cases, take advantage of Section 69.123's geographic deaveraging provisions.[173] It is therefore possible for price cap LECs to charge different prices in, for example, rural and urban areas within an MSA or non-MSA portion of a study area, and the record indicates that carriers may engage in this practice.[174]

59. Moreover, in Phase I and Phase II pricing flexibility areas, carriers can and do offer contract tariffs to special access customers on an individualized basis. The record indicates that such contract

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Qwest 2009 PN Comments at 26-28. Verizon notes that, for instance, in 2009, there were 71,000 total significant commercial buildings in the Chicago MSA. Verizon 2009 PN Reply at 23.

[168] AT&T 2009 PN Comments, AT&T Carlton / Sider Decl. at para. 35. AT&T notes that in *WorldCom*, the D.C. Circuit upheld the Commission's selection of the MSA as the appropriate geographic market for pricing flexibility. AT&T 2007 PN Reply at 44.

[169] *See* 47 C.F.R. § 69.123; *Pricing Flexibility Order* 14 FCC Rcd at 14252-57, paras. 59-66.

[170] *Pricing Flexibility Order* 14 FCC Rcd at 14252, para. 59.

[171] *Pricing Flexibility Order* 14 FCC Rcd at 14254, para. 61.

[172] *Id.* at 14254, para. 62.

[173] *See, e.g.*, Verizon Aug. 16, 2010 *Ex Parte* Letter at 5 ("The discounts available under Verizon's non-circuit specific discount plans are applied to Verizon's standard or base tariffed rates, which typically vary by study area (which are roughly equal to an entire state and typically contain several different density zones) and also by density zone. As a result, customers generally pay a range of prices for special access services purchased under Verizon's generally available, non-circuit specific discount plans."); Verizon Wholesale, Density Cells/Zones (East), XLS File, http://www22.verizon.com/wholesale/searchportal/index.jsp?datapath=http://www22.verizon.com/wholesale/&ip_text=density&category (last visited Aug. 13, 2012); CenturyLink Wholesale, MSA & Geographic Zone Data for Pricing, Density, and Maintenance and Repair Intervals, http://www.centurylink.com/wholesale/guides/geozone.html (last visited Aug. 13, 2012).

[174] *See, e.g.*, T-Mobile 2009 PN Reply at 8 ("In some rural areas, prices for connectivity may be multiples of prices for the same level of service in more populated areas. Many incumbent LECs in rural markets continue to charge legacy prices for special access even though their facilities may have been paid off for years."); USTA 2009 PN Reply, Fact Report Appendix at para. 5 ("Under FCC rules, price-cap regulated rates may vary across "density zones" to reflect the different characteristics of urban, suburban, and rural geographies. As one would expect, in some (not all) cases, pricing by zones persists under pricing flexibility."); Letter from Thomas Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 Attach. A at 3, 6-7 (filed July 9, 2009) (tw telecom July 9, 2009 *Ex Parte* Letter) (illustrating price variations for like services in different areas within a single tariffed region).

terms are rarely, if ever, adopted by other special access purchasers.[175] Thus, whether special access pricing is, in fact, disciplined across a broad geographic area as claimed by incumbent LECs remains an open question.

f. Changes to MSAs Impact Non-MSA Rules

60. Price cap LECs seeking pricing flexibility under our rules in a non-MSA area must make competitive showings throughout the entire non-MSA portion of a study area, rather than a Rural Service Area or smaller geography.[176] The Commission justified its adoption of the non-MSA as the appropriate geographic area because it predicted that "competitive entry into rural areas [would] be less concentrated than in urban areas."[177] Embarq contends that our decision to use the non-MSA parts of a study area, instead of an RSA, has made it impossible for Embarq to obtain relief in Missouri despite the presence of competition.[178] Though Embarq's situation may be indicative of a problem specific to our choice of adopting the non-MSA, any changes we find to be warranted with respect to the MSA, as discussed above, must be reflected by corresponding changes to non-MSA areas.

61. Moreover, the record in this proceeding suggests that the *Pricing Flexibility Order*'s prediction that competition in rural areas would not be concentrated was incorrect.[179] A review of our grants of pricing flexibility for channel terminations to end users in non-MSA areas highlights problems similar to what we found in MSA areas. Specifically, out of five of these types of grants, three were based on high concentrations of demand. Verizon's grant in non-MSA Idaho was based on the revenues of 3 out of 26 wire centers,[180] and its grant for non-MSA West Virginia was based on revenues from 8 out of 97 wire centers.[181] A third grant, from ACS, was based on revenues from only half of the wire centers in non-MSA Juneau, Alaska.[182] This suggests that, at the time the grant of pricing flexibility was made,

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[175] *See, e.g.*, AT&T Response to *Special Access Competition Data Public Notice*, Question B.8.d at 3 (stating that **[REDACTED]** subscribe to each of its contract tariffs in the surveyed MSAs); Letter from Melissa E. Newman, Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593, at 2 (filed June 19, 2012) (stating that "it is rare for a customer to opt into an existing contract-based tariff negotiated by a different customer," because those contract tariffs are "individually negotiated and tailored to meet individual customers' needs") (CenturyLink June 19, 2012 *Ex Parte* Letter); CenturyLink Response to *Special Access Competition Data Public Notice*, Question III.B.8 (filed Dec. 5, 2011) (same).

[176] 47 C.F.R. § 69.707(b); Pricing Flexibility Order, 14 FCC Rcd at 14261, para. 76.

[177] *Pricing Flexibility Order,* 14 FCC Rcd at 14261, para. 76.

[178] Embarq 2007 PN Comments at 15.

[179] *Pricing Flexibility Order,* 14 FCC Rcd at 14261, para. 76.

[180] *See Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and Attachments, Attach. D at 27 (filed Nov. 29, 2001); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, Memorandum Opinion and Order, 17 FCC Rcd 5359, 5371, para. 27 (Common Carrier Bur. 2002); *see also* App. D.

[181] *See Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and Attachments, Attach. D (filed Dec. 13, 2002); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 02-33, Memorandum Opinion and Order, 18 FCC Rcd 6237, 6244, para. 17 (Wireline Comp. Bur. 2003); *see also* App. D.

[182] *See ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. Petition for Phase II Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's Rules,* Petition for Pricing Flexibility and Appendices, App. B at 3-4 (filed Jan. 29, 2010); *Petition of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc., for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's Rules*, (continued….)

competitive conditions varied greatly within the non-MSA areas. Even if new competitors subsequently entered the non-MSA, for the reasons discussed above with respect to MSAs, they are likely to locate only in areas of high demand.[183] Thus, the evidence in this proceeding suggests highly concentrated competitive conditions at the time pricing flexibility was granted. This indicates that the *Pricing Flexibility Order*'s prediction that competition in non-MSA areas would be less concentrated than in urban areas may have been incorrect.

3. The Competitive Showings Are Not as Administratively Simple as Expected

62. In addition to the issues identified above, our experience shows that our rules, which were intended first and foremost to be straightforward and simple to administer, are not. Specifically, in adopting the *Pricing Flexibility Order*, the Commission concluded that using MSA-based rules would be simpler and less expensive to administer than rules based on other geographies or regimes that might create a "more finely-tuned picture of competitive conditions."[184] However, the rules have not been as administratively simple or easy to verify as the Commission anticipated, nor does it appear that they have provided bright-line guidance to industry. We therefore choose to redirect our efforts to conducting a more complete market analysis, as discussed in greater detail in Section V below.

63. Previous pricing flexibility petitions demonstrate that our rules have failed to provide a clear-cut guide to industry. For example, Section 22.909(a) of our rules define MSAs for pricing flexibility, as "…306 areas… defined by the Office of Management and Budget, as modified by the FCC."[185] Because OMB changes the list of MSAs and component counties, as discussed above, Section 22.909 of the Commission's rules refers to a static list, based on data from the 1980 Census.[186] Nonetheless, the fact that our rules refer to areas in which to make a competitive showing as "MSAs" has apparently created some confusion among petitioners, resulting in petitions containing data calculated over different MSA definitions. For example, Pacific Bell submitted a petition for pricing flexibility in the San Diego and Sacramento MSAs based on the list referenced in Section 22.909 of our rules.[187] In contrast, Embarq and Cincinnati Bell based their 2007 pricing flexibility petitions on MSAs drawn in accordance with a "Metropolitan Areas (1993)" map, located on the Commission's website, that provides a detailed description of how the map includes MSAs as defined by OMB.[188] However, because the 1993 MSAs

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WCB/Pricing File No. 10-02, Order, 25 FCC Rcd 7128, 7135, para. 20 (Wireline Comp. Bur. 2010); *see also* App. D.

[183] *See* SBC Casto Decl. at para. 6; *see also supra* paras. 52-55 (discussing competitors showing a high tendency to locate in areas of concentrated high business demand).

[184] *Pricing Flexibility Order,* 14 FCC Rcd at 14260, para. 74.

[185] 47 C.F.R. 22.909(a).

[186] *See supra* para. 26; *see also supra* n.82.

[187] Our pricing flexibility rules define the term "MSA" at 47 C.F.R. § 22.909(a). *See e.g., Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the San Jose, San Francisco, Sacramento, Los Angeles/Long Beach, Orange County, Oakland and San Diego CA MSAs,* Petition for Pricing Flexibility and Appendices, App. D at 1 (filed Nov. 17, 2000) (available on the Commission's Electronic Tariff Filing System).

[188] *Petition of Embarq Local Operating Companies (Embarq) for Phase I and Phase II Pricing Flexibility for Special Access and Dedicated Transport Services in the Lima, Ohio and Mansfield, Ohio Metropolitan Statistical Areas and Phase I and Phase II Pricing Flexibility for Channel Termination Services in the Lima, Ohio Metropolitan Statistical Area*, Petition for Pricing Flexibility and Attachments at Attach. B at 2 n.2 (filed Apr. 30, 2007) (*Embarq 2007 Pricing Flexibility Petition*); *Petition of Cincinnati Bell Telephone Company LLC (CBT) for Phase I Pricing Flexibility for Special Access, Dedicated Transport Services and End-User Channel Terminations, and Phase II Pricing Flexibility for POP Channel Termination in the Cincinnati, Ohio-Kentucky-Indiana*
(continued….)

were more recently constructed and based on 1990 Census data, the component counties that make up each MSA are often different from those in the MSA list referenced in Section 22.909 of our rules.[189] Thus, our supposedly bright-line rules have failed to provide guidance to sophisticated firms such as Embarq and Cincinnati Bell.

64. Moreover, our competitive showings are ambiguous and require time-intensive review and policy decisions by Commission staff. In order to fulfill the requirements of the revenue-based competitive showings, a petitioner must: a) provide a list of wire centers within that MSA; and b) calculate revenues based on that number.[190] However, our rules do not specify how to determine whether a wire center belongs to a specific MSA, nor do they provide enough specifics as to what revenues should be included. Therefore, as applied, petitioners are making these determinations using different methodologies. For example, Southwestern Bell determined which wire centers belonged to the Amarillo and St. Louis MSAs based on "the Collocation Implementation, Collocation Point of Contact and Tracking Database," which includes wire center information for all MSAs.[191] It excluded from its revenue calculations those revenues derived from Individual Case Basis (ICB) arrangements,[192] *i.e.*, "the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions."[193] An ICB arrangement may involve services directly related

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Metropolitan Statistical Area, and Phase I Pricing Flexibility for Special Access Dedicated Transport Services and POP Channel Terminations in the Hamilton – Middletown, Ohio Metropolitan Statistical Service Area, Petition for Pricing Flexibility and Attachments at Attach. B at 2 n.8 (filed Nov. 27, 2007) (*Cincinnati Bell 2007 Pricing Flexibility Petition*).

[189] The Embarq and Cincinnati Bell petitions cite http://transition.fcc.gov/oet/info/maps/census/metroareas/, which shows a map of the 1993 MSAs as defined by OMB. *Embarq 2007 Pricing Flexibility Petition* at Attach. B at 2 n.2; *Cincinnati Bell 2007 Pricing Flexibility Petition* at Attach. B at 2 n.8. A text-based list of the 1993 MSAs and component counties can be found at http://www.census.gov/population/metro/files/lists/historical/93mfips.txt. *But cf. 1992 MSA/RSA Public Notice*, 7 FCC Rcd at 742-97 (listing a different set of MSAs and component counties).

[190] *See* 47 C.F.R. §§ 1.774, 64.707, 64.713.

[191] *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Amarillo TX, and St. Louis MO MSAs*, Petition for Pricing Flexibility and appendices, app. D at 2 (filed Dec. 19, 2001).

[192] *Id.* at App. D, 3. *See also, e.g., Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and Appendices, App. D at 3 (filed Jan. 30, 2003); *Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Bakersfield, Fresno, Los Angeles-Long Beach, et al., Oxnard-Simi Valley-Ventura, Santa Rosa-Petaluma, and Stockton, CA MSAs*, Petition for Pricing Flexibility and Appendices, App. D at 3 (filed Jan. 30, 2003).

[193] *Local Exchange Carriers Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-166, Order on Remand, 23 FCC Rcd 569, 570 n. 2 (2008). *See also Southwestern Bell Telephone Company*, CC Docket No. 97-158, Transmittal No. 2633, Order Designating Issues for Investigation, 12 FCC Rcd 10231, 10242, para. 20 (CCB 1997) ("[U]nlike contract tariffs, although the tariffs containing the specific service offerings and ICB rates are filed with the Commission, ICB offerings are not immediately available to other prospective customers.") (citing *Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 94-1, 93-124, 93-197, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 888 (1995); *Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings*, Public Notice, 11 FCC Rcd 4001, 4001 (CCB 1995)) (defining ICB offerings and finding that such offers are generally not available to other prospective purchasers). The Commission has explained that "there are two types of ICB offerings: (1) those that provide a new technology for which little demand initially exists, but that later evolve into generally-available offerings as demand grows; and (2) (continued….)

to the provision of special access services, such as special conditioning of a line. In contrast, in a 2008 petition, Windstream acknowledged that some of its wire centers located outside the applied-for MSA may serve locations inside the MSA boundary.[194] Therefore, based on its own engineering maps, "Windstream calculated the exchange area that fell within the MSA. If the area calculated exceeded 50 percent of the total area of the wire center, the wire center was assigned to the MSA."[195] In contrast to Southwestern Bell's system of calculating revenues, Windstream included ICB revenues in its revenue calculations.[196] Thus, in order to properly evaluate whether these petitioners have fulfilled the requirements of our rules, which are silent on these issues, Commission staff would have to do a thorough review of the company's internal records, exercise an extensive amount of independent judgment, and make some significant policy decisions as to whether each company's interpretation of our rules are consistent with the terms of the *Pricing Flexibility Order*.

C. Shortcomings of Competitive Showings Based Exclusively on Collocation

65. Significant questions also exist about the reliability of collocation as a proxy for facilities-based competition in end user channel terminations. Charges for special access generally are divided into channel termination charges and channel mileage charges.[197] Channel termination charges recover the costs of facilities between the customer's premises and the LEC end office and the costs of facilities between the IXC POP and the LEC serving wire center.[198] Channel mileage charges recover the costs of facilities (also known as interoffice facilities) between the serving wire center and the LEC end office serving the end user.[199] In the *Pricing Flexibility Order*, the Commission found that pricing flexibility for channel terminations between a LEC end office and a customer premises required a higher threshold showing than pricing flexibility for other dedicated transport and special access services.[200] In reaching this determination, the Commission acknowledged that the economics of channel terminations between the LEC office and the customer premises make it more costly for new entrants to compete in that product market.[201]

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those that are unique service arrangements offered to meet the needs of specific customers and that never evolve into a generally-available offering." *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730, 18906, para. 428 (1997).

[194] *Petition of Windstream Kentucky East, LLC for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Lexington, Kentucky MSA and Ashland, Kentucky MSA*, Petition for Pricing Flexibility and Appendices, App. D at 1 (filed June 13, 2008).

[195] *Id.*

[196] *Id.* at 2.

[197] *Special Access NPRM*, 20 FCC Rcd at 1997, para. 8.

[198] *Id.*

[199] *Id.*

[200] *Pricing Flexibility Order*, 14 FCC Rcd at 14278-79, paras. 101-02.

[201] *Special Access NPRM*, 20 FCC Rcd at 2022, para. 82 n.203. The Commission noted that
> Entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport all involve carrying traffic from one point of traffic concentration to another. Thus, entering the market for these services requires less investment per unit of traffic than is required, for example, for channel terminations between an end office and customer premises. Furthermore, investment in entrance facilities enables competitors to provide service to several end users, while channel terminations between an end office and customer premises serve only a single user. Accordingly, competitors are likely to enter the market for entrance facilities, direct-

(continued….)

1. Rationale for Adopting Collocation as the Sole Indicator of Competition

66. The competitive showings require price cap LECs to offer evidence of collocation by "competitors that use transport provided by a transport provider other than the incumbent LEC" for granting pricing flexibility for special access and dedicated transport. The Commission considered that the competitive showings reasonably balanced two goals: "(1) having a clear picture of competitive conditions in the MSA, so that we can be certain that there is irreversible investment sufficient to discourage exclusionary pricing behavior; and (2) adopting an easily verifiable, bright-line test to avoid excessive administrative burdens."[202] The Commission found that collocation was a "reliable indicator of sunk investment by competitors" in dedicated transport and special access services other than channel terminations because it demonstrated a financial investment by the competitor in establishing facilities in that wire center.[203]

67. With respect to channel terminations, the Commission acknowledged that "collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises."[204] Indeed, the Commission recognized that "a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC."[205] The Commission predicted, however, that "that a new market entrant would provide channel terminations through collocation and leased LEC facilities only on a transitional basis and [would] eventually extend its own facilities to reach its customers."[206] It thus concluded that despite "the shortcomings of using collocation to measure competition for channel terminations, . . . it appears to be the best option available to us at this time."[207]

2. More Recent Evidence Suggests that Collocation May Produce an Unreliable Picture of Competitive Conditions

68. Evidence submitted to the Commission since 1999 calls into question the Commission's prediction that collocators would eventually build their own channel terminations to end users. By the end of 2005, six years after the adoption of the *Pricing Flexibility Order*, SBC Communications, Inc. (SBC) had obtained pricing flexibility for channel terminations to end users in 67 MSAs.[208] That same year, it acquired AT&T Corporation.[209] Both the Commission and the Antitrust Division of the U.S. Department of Justice ("the Division") approved the transaction, subject to several concessions, including

(Continued from previous page)

> trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport before they enter the market for channel terminations between a LEC end office and a customer premises.

Id. (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14279, para. 102).

[202] *Pricing Flexibility Order,* 14 FCC Rcd at 14262, para. 78.

[203] *Id.* at 14265-66, paras. 81-82 (stating that "in the past, the presence of an operational collocation arrangement in a wire center almost always implied that a competitor has installed transmission facilities to compete with the incumbent").

[204] *Id.* at 14279, para. 103.

[205] *Id.*

[206] *Id.* at 14280, para. 104.

[207] *Id.* at 14279, para. 103.

[208] *See infra* App. D.

[209] *See* Letter from Wayne Watts, Senior Vice President and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-65 (filed Dec. 19, 2005) (AT&T Dec. 19, 2005 *Ex Parte* Letter).

divestitures.[210] Despite SBC's success in obtaining pricing flexibility in many MSAs, the Division's antitrust investigation concluded that "for the vast majority of commercial buildings in its territory, SBC is the only carrier that owns a last-mile connection to the building."[211] That same year, the Commission's review of Qwest's petition for forbearance in Omaha, Nebraska showed that some buildout to end users had occurred, but only in 9 out of 24 of Qwest's wire centers in the Omaha MSA.[212] This was three years after Qwest had obtained Phase II pricing flexibility in the Omaha MSA, based on the revenues of 11 wire centers (8 of which overlapped with the 9 wire centers with buildout to end users).[213] In 2006, the U.S. Government Accountability Office ("GAO") analyzed 16 metropolitan areas in which the Commission had granted pricing flexibility and found that facilities-based competitors served fewer than 6 percent of buildings with at least a DS1-level of demand.[214] In 2010, Qwest noted in its transfer of control application with CenturyLink that "it is Qwest's practice generally to use the facilities of other carriers when it sells services to enterprise customers in locations outside of its service territory."[215]

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[210] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18310-11, para. 40; *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Final Judgment (D.D.C. filed Oct. 27, 2005).

[211] Competitive Impact Statement, *U.S. v. SBC Communications Inc. and AT&T Corp*., Civil Action No. 1:05CV02102 (EGS) at 6 (filed Nov. 16, 2005) (cited in ATX *et al.* 2007 PN Comments at 17-18), *available at* http://www.justice.gov/atr/cases/f213000/213026.pdf.

[212] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Service Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444-45, paras 59-60 (2005) (*Qwest Omaha Forbearance Order*) (granting forbearance in 9 of 24 wire centers in Qwest's petition based on greater competitive deployment in those 9 wire centers). The Commission noted that

> except in limited geographic areas, Qwest has not demonstrated that it is subject to significant competition from competitors that do not rely heavily on Qwest's wholesale services . . . . Cox is not able to provide the same level of competition where it does not have extensive coverage as where it has such coverage. We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing 'last-mile' facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA.

Qwest Omaha Forbearance Order, 20 FCC Rcd at 19444-45, paras 59-60. Although the Commission's analysis in the *Qwest Omaha Forbearance Order* concerned the use of loop and transport network elements to compete in the retail market, the essential distinction between established, successful, facilities-based competition vs. reliance on wholesale access to facilities applies equally to special access services.

[213] *See Qwest Petition For Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 02-01, Memorandum Opinion and Order, 17 FCC Rcd 7363 (Wireline Comp. Bur. 2002); *see also Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, App. F (Required Collocator Demonstrations) at 18 (filed Dec. 31, 2001); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c), Exh. A, Affidavit of David L. Teitzel at 2 n.3.

[214] U.S. Government Accountability Office, FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services 10, 19 (2006), *available at* http://www.gao.gov/assets/260/254069.pdf.

[215] Qwest Communications International, Inc., Transferor, and CenturyTel, Inc. d/b/a CenturyLink, Transferee, Application for Transfer of Control Under Section 214 of the Communications Act, as Amended, at 6 n. 36 (filed May 10, 2010) ("Although it is Qwest's practice generally to use the facilities of other carriers when it sells services to enterprise customers in locations outside of its service territory, it is possible that, within Qwest's 14-state region, Qwest has built facilities to serve individual customers within CenturyLink territory. Any such situations would be limited to sales to customers with multiple sites, within and outside of Qwest territory. Qwest has not built facilities in CenturyLink territory for the purpose of marketing to multiple customers.")

69. Commenters' pleadings also suggest that collocation has not always developed into facilities-based competition. As evidence to support its assertion that our predictions about collocation were inaccurate, TW Telecom relied on data supplied by Verizon to assert that between 1996 and 2004, non-incumbent LEC channel termination buildout to commercial buildings increased from 24,000 buildings to approximately 31,467 buildings (a change of 7,467), in contrast to the "millions of buildings served by incumbent LEC fiber."[216] In 2005, WilTel estimated that competitors had deployed to 25,000 buildings, whereas Sprint asserted in 2007 that only 22,000 buildings had competing connections.[217] Moreover, TW Telecom states that, as of a 2003 Commission finding, competitors serve only three to five percent of commercial buildings nationwide.[218] It also submitted evidence that it contends shows that, four years after Verizon had obtained Phase I pricing flexibility in the New York MSA for channel terminations to end users, competitors served fewer than **[REDACTED]** of 220,000 buildings in New York City.[219] Its evidence also showed that, in Chicago, where Ameritech had obtained pricing flexibility for channel terminations in 2003, competitors connected to only 429 out of 241,000 commercial buildings.[220]

70. Commenters also argue that the mere installation of third party facilities within wire centers does not equate to competition by collocators because in some cases they are not being used to provide competitive service. For example, in its oppositions to two incumbent LEC petitions for pricing flexibility, AT&T argued that it never used the facilities it had installed in some of the wire centers listed in the petitions, and it was therefore erroneously identified as a competitive collocator.[221] However, the competitive showing rules do not require incumbent LECs to show that collocation facilities are being used, but only that they exist in the wire center.[222] Moreover, Sprint argues that collocation "is indicative

[216] tw telecom 2005 NPRM Reply at 5-6.

[217] WilTel 2005 NPRM Reply at 6; Letter of Anna Gomez, VP-Government Affairs, Sprint/Nextel to Marlene H. Dortch, Secretary, FCC (filed Mar. 27, 2007), Attachment at 2 n.4.

[218] tw telecom / One Communications 2007 PN Comments at 9; tw telecom 2005 NPRM Reply at 5-6. *See also* tw telecom / One Communications 2007 PN Comments at 8 (citing *Triennial Review Order*, 18 FCC Rcd at 17155, para. 298 n.856.).

[219] tw telecom 2005 NPRM Reply at 5-6.

[220] *Id.* at 15-16; tw telecom / One Communications 2007 PN Comments at 9.

[221] *Access Charge Reform*, *Price Cap Performance Review for Local Exchange Carriers*, *Interexchange Carrier Purchases of Switches Access Services Offered by Competitive Local Exchange Carriers*, *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Petition for Pricing Flexibility and attachments (filed Mar. 20, 2001); *see also AT&T Opposition to Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 01-07 (filed Apr. 4, 2001); *Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-07, Memorandum Opinion and Order, 16 FCC Rcd 13885, 13889-90, para. 10 (Wireline Comp. Bur. 2001); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments (filed Nov. 29, 2001); *AT&T Opposition to Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services* at 3 (filed Dec. 13, 2001); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, Memorandum Opinion and Order, 17 FCC Rcd 5359, 5365-66, paras. 13-14 (Common Carrier Bur. 2002) (*Verizon 2002 Pricing Flexibility Order*). AT&T noted that bankrupt competitive LECs were not in a position to comment on those proceedings. *Verizon 2002 Pricing Flexibility Order*, 17 FCC Rcd at 5356-66 nn.39-40.

[222] *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (Common Carrier Bur. 2000).

not that the competitor has placed its own facilities into buildings but rather that it has dependence upon the incumbent's facility."[223]

71. We acknowledge that this evidence is limited. The Commission's recent attempts to obtain more robust facilities data through voluntary production have provided useful, but incomplete, data.[224] Nonetheless, the evidence we do have suggests our predictions were inaccurate and that the accuracy of the use of collocations as a proxy for actual or potential competition warrants further investigation. We therefore intend to issue a data request that will require carriers to submit the data we need to test the accuracy of the predictions we made about collocation in the *Pricing Flexibility Order*.

3. Existence of Non-Collocation Based Competition Does Not Undercut the Need to Suspend Grants of New Pricing Flexibility Petitions

72. Several commenters argue that relying exclusively on collocation is flawed because it undercounts entry by non-collocating firms who have built their own facilities.[225] We agree, but because we lack reliable data on the extent or location of this competition, it does not change our conclusion that new pricing flexibility petitions should be suspended at this time.

73. Several commenters discuss growing competition from non-collocating competitors, such as cable. For example, Verizon claims that the competitive showings preclude it from obtaining pricing flexibility commensurate to the level of competition they claim exists in Los Angeles, Boston, New York, Philadelphia, and Washington, DC, because our rules do not account for several non-collocating firms that Verizon's research indicates have operations in those areas.[226] AT&T has similar complaints for its operations in Chicago, Dallas, Houston, Detroit, San Diego and St. Louis, contending that it has lost special access business to cable firms in many instances.[227] Embarq asserts that it too has lost business to a competitive LEC, Cox Cable, that does not collocate in Las Vegas, Nevada, and Fort Walton Beach and Ocala, Florida.[228] Price cap LECs also criticize the rules for excluding competitors that collocate at "collocation hotels," as opposed to price cap LEC wire centers.[229] Thus, the record indicates that at times

[223] Letter from Paul Margie & Rachel Petty, Counsel, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, Federal Communications Commission, WC Docket No. 05-25, RM-10593, WCB/Pricing Docket Nos. 12-04, 12-05, 12-06 at 5 (filed May 24, 2012) (quoting July 2010 Special Access Workshop Transcript at 23-24 (July 19, 2010) (Remarks of Lee Selwyn, Economics and Technology, Inc.), http://reboot.fcc.gov/c/document_library/get_file?uuid=f01ad781-6dd7-4ace-a7fc-bc296dc88315&groupId=19001).

[224] *See Special Access Facilities Data Public Notice*, 25 FCC Rcd at 15146 (seeking information and data on special access facilities); *see also Special Access Competition Data Public Notice*, 26 FCC Rcd at 14000 (seeking information and data on special access pricing and terms and conditions).

[225] Sprint 2005 NPRM Comments at 2, 9-10; Verizon 2005 NPRM Comments at 36-8; BellSouth 2005 NPRM Comments at 50-55; USTA 2005 NPRM Comments at 15-16; Iowa Telecom/Valor 2005 NPRM Comments at 19-20; Sprint 2009 PN, Decl. of Bridger M. Mitchell (Sprint Mitchell Decl.), Attach. A at 19, paras. 78-79.

[226] Verizon 2005 NPRM Comments at 27.

[227] AT&T 2007 PN Comments at 28. Though AT&T also complained about its inability to achieve Phase II pricing flexibility in the San Francisco MSA, we note that Pacific Bell recently obtained Phase II pricing flexibility for channel terminations there. *See Petitions of Pacific Bell, Southwestern Bell, and Windstream for Pricing Flexibility in Specified Metropolitan Statistical Areas Deemed Granted by Operation of Law*, WCB/Pricing File Nos. 12-04, 12-05, 12-06, Public Notice, DA 12-1000 (Wireline Comp. Bur. rel. June 26, 2012).

[228] Embarq 2007 PN Comments at 7.

[229] Verizon 2005 NPRM Reply at 23-25; *see also* AT&T 2009 PN Comments at 29-30 & n. 50; AT&T 2009 PN Reply at 17; AT&T 2007 PN Comments at 4, 28; AT&T 2007 PN Reply at 45; CenturyLink Response to *Special Access Competition Data Public Notice*, Question III.E.1 (filed Dec. 5, 2011); Qwest Response to *Special Access Facilities Data Public Notice*, Question III.F (filed Jan. 27, 2011); Verizon Response to *Special Access Facilities* (continued….)

the rules may prevent price cap LECs from obtaining partial or full pricing flexibility because they do not account for competition sufficient to discipline rates from facilities-based competitors.

74. We agree. As the Commission stated when it adopted its competitive showings rules, it has "long recognized that it should allow incumbent LECs progressively greater pricing flexibility as they face increasing competition" and wanted to ensure that its "regulations do not unduly interfere with the development and operation of these markets as competition develops."[230] It would be inconsistent with this approach if we inappropriately subjected price cap LECs to unnecessary regulations, despite the emergence of competition that bright-line rules are unable to detect. We therefore agree to undertake a robust competition analysis that takes these factors into account, as described below.

75. Moreover, there is currently no evidence in the record addressing the relationship, if any, between collocation levels and the presence of non-collocated competitors. Such data would assist in testing incumbents' claims that they have lost business to non-collocating competitors with their own fiber.[231] We intend to obtain evidence on this point in order to conduct the robust competition analysis described below.[232]

IV. GRANTS OF PRICING FLEXIBILITY ARE SUSPENDED

76. As set forth in sections B and III.C above, there is compelling evidence that the competitive showings adopted in 1999 have not worked as intended, and that our pricing flexibility rules are simultaneously preventing grants of pricing flexibility in areas that likely are competitive and allowing grants of pricing flexibility in areas where it is not appropriate to do so. While we today initiate the process of developing a better way to identify areas where special access regulatory relief is appropriate, it would not serve the public interest to allow continued grants of pricing flexibility under our old rules. We therefore act in this section to temporarily suspend the operation of our competitive showing rules pending completion of our inquiry.

A. Suspension of Competitive Showing Rules for Channel Terminations

77. Based on the evidence in the record as discussed in subsections B and III.C above, we suspend further grants of pricing flexibility on the basis of our existing pricing flexibility rules. Generally, the Commission's rules may be suspended for good cause shown.[233] In light of the significant problems identified with grants of regulatory relief at the MSA level, continuing to grant relief under the current framework would run precisely the risk that the Commission sought to avoid in the *Pricing Flexibility Order*: "granting pricing flexibility over such a large geographic area would increase the likelihood of exclusionary behavior by incumbent LECs by giving them flexibility in areas where

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Data Public Notice, Question III.F (filed Jan. 27, 2011); AT&T 2007 PN Comments, Attach. A, Decl. of Parley Casto (AT&T Casto Decl.) at paras. 12, 16, 20; Letter from Glenn Reynolds, Vice President for Policy, US Telecom, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, RM-10593 at 2 (filed Dec. 1, 2010) (USTA Dec. 1, 2010 *Ex Parte* Letter).

[230] *Pricing Flexibility Order*, 14 FCC Rcd at 14257, para. 67.

[231] *See, e.g.*, Verizon 2005 NPRM Comments at 27-29. Verizon notes, for example, that its number of collocation arrangements decreased between 2001 and 2005, from 6293 collocation arrangements in Verizon East and 1224 in Verizon West (2001) to 4922 collocation arrangements in Verizon East and 1158 collocation arrangements in Verizon West (2005). Verizon 2005 NPRM Comments at 24 n.18.

[232] *See infra* Section V.

[233] 47 C.F.R. § 1.3 ("The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown . . . .").

competitors have not yet made irreversible investment in facilities."[234] Given our finding that the special access pricing flexibility triggers are not operating as predicted by the Commission, our action here suspending the application of those rules while we consider possible new regulatory approaches is necessary in the public interest. In addition, it is consistent with our "continuing obligation to practice reasoned decision making" under the APA.[235] Indeed, this continuing obligation to practice reasoned decision making and revisit our rules is especially relevant where our predictive judgments do not materialize.[236] The record indicates that the 1999 competitive showing rules are both over-inclusive and under-inclusive, thereby resulting in grants of pricing flexibility to broad geographic areas (*i.e.*, MSAs) based on small pockets of concentrated demand, or denials of pricing flexibility where competitive alternatives are not recognized by the existing rules.[237] Moreover, there is evidence that collocations – while perhaps "the best option available" to the Commission at the time – are not a reliable indicator of the presence of actual or potential competition in the provision of channel terminations.[238]

78. The Commission's rules provide that petitions for pricing flexibility for special access services that are not denied within 90 days after the close of the pleading cycle are deemed granted.[239] Given the significant problems identified with our existing pricing flexibility rules discussed above, we find that it would be inappropriate to allow new grants of flexibility under those rules. Thus, pursuant to rule 1.3, we find good cause to suspend the 90 day deadline in rule 1.774(f)(1) and do so on our own motion.[240] We therefore amend our rules as set forth in Appendix A.

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[234] *Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 72.

[235] *See, e.g.*, *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991).

[236] *See Cellnet Commc'ns v. FCC,* 149 F.3d 429, 442 (6th Cir. 1998) ("If the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunsetting provisions in accordance with its continuing obligation to practice reasoned decision making.").

[237] *See supra* section III.

[238] *Pricing Flexibility Order*, 14 FCC Rcd at 14279-80, para. 103; *see supra* section III. For comments raising additional concerns about the use of collocations as a proxy for competition for channel terminations, see, for example, XO 2005 NPRM Comments at 10; Sprint 2007 PN Comments at 16 n.48; tw telecom 2007 PN Comments at 20-21, 24; COMPTEL 2007 PN Comments at 6.

[239] 47 C.F.R. § 1.774(f).

[240] The *2005 Special Access NPRM* sought comment on "whether our pricing flexibility rules reflect a sufficiently robust assessment of the level of interstate special access competition," including whether "actual marketplace developments have validated the . . . predictive judgments made in the *Pricing Flexibility Order*" and whether "we should consider additional measures of competition." *Special Access NPRM*, 20 FCC Rcd at 2021, para. 80. Though it sought general comment on "what interim relief, if any, is necessary to ensure special access rates remain reasonable while" the Commission considered possible permanent rule changes, it declined to adopt at that time a proposal by AT&T that included, as one element, a proposed moratorium on further grants of pricing flexibility because the record was insufficient to justify that action. *Id.* at 2035-36, paras. 128-29, 131. As discussed above, the record now provides a sufficient basis to justify such action. While one of the dissenters complains that it has taken years to address aspects of the issues raised in the *NPRM*, it is nonetheless appropriate for the Commission to address issues in the pending *NPRM*, and we particularly note that as the Commission has worked through these issues, it issued public notices to ensure the record was updated and highlighted that the issue of whether the pricing flexibility rules were "working as intended" was central to this inquiry. *See Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, 22 FCC Rcd 13352 (2007) (*Refresh the Record Public Notice*); *see also Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009) (*Analytical Framework Public Notice*); *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146(2010) (*Special Access Facilities Data Public Notice*); *Special Access* (continued….)

B. Suspension of Competitive Showing Rules for Non-Channel Termination Special Access

79. As noted above, the staff analysis of specific data highlighting problems with the MSA was restricted to channel terminations to end users. Nonetheless, the record also indicates a lack of "reasonably similar" competitive conditions within an MSA for dedicated transport. As discussed above, both Verizon and SBC concede that special access demand – for *all* categories of special access services – is extremely concentrated.[241] Fiber maps that they submitted throughout this proceeding, which include both dedicated transport and channel terminations, highlight that fact. In 2007, AT&T submitted detailed maps showing competitive deployment for Atlanta, Georgia; Miami, Florida, Columbus, Ohio, Austin, Texas and San Jose, California.[242] In 2012, it submitted competitive deployment maps for three of those same MSAs (Atlanta, Miami and San Jose), as well as several other MSAs.[243] Though each of those maps – whether they were produced in 2007 or 2012 – display competitive fiber in the central portion of each MSA, none of those maps show that those competitive fibers reach throughout the MSAs.[244] In addition, as discussed above with respect to our review of pricing flexibility grants for channel terminations for end users, in a significant number of the MSAs where price cap carriers have been granted relief, a large proportion of wire centers have either no collocations, no competitive transport, or both. This calls into question whether our transport bright-line tests, which if met lead to pricing flexibility being applied to the entire MSA, appropriately distinguish where competition exists and where it does not.[245] Further, though the *Pricing Flexibility Order* noted competitive differences among special access services, it did not make any distinctions as to the appropriate geographic area of relief based on the type of service at issue.[246] Instead, the Commission adopted bright-line competitive showings, with a

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Competition Data Public Notice, 26 FCC Rcd at 14000. Thus, the Report and Order we adopt here is, at a minimum, a "logical outgrowth" of that central issue of the *2005 Special Access NPRM*. *Compare Covad Commc'ns Co. v. FCC*, 450 F. 3d 528, 548-49 (D.C. Cir. 2006) (noting that the "logical outgrowth" test is contingent on whether parties could have anticipated an agency action in light of the initial notice), *and Building Indus. Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) ("to avoid perpetual cycles of new notice and comment periods, a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period") (internal quotation marks and citations omitted); *and Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976) (because comments submitted in response to a rulemaking notice "will frequently prompt changes in the ultimate regulations," nothing in the APA "requires new notice whenever the agency responsibly adopts the suggestions of interested parties"), *with infra* Pai Statement at 103 (stating that the Commission declined to suspend grants of pricing flexibility in 2005 and must provide public notice of its intent to suspend and amend its rules). Comments suggest that a logical outgrowth of this language is that suspension of further grants of pricing flexibility was a possibility. *See, e.g.*, Letter from Charles W. McKee, Vice President, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 at 2 (filed June 28, 2010); Letter from Tamar E. Finn and Michael R. Romano, counsel for TelePacific, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, Attach. at 3 (filed Dec. 4, 2009); SBC 2005 NPRM Comments at 27.

[241] *See, e.g.,* Verizon 2005 NPRM Comments at 3.

[242] Attach. to AT&T Casto Decl. (Fiber Maps).

[243] AT&T June 20 *Ex Parte* Letter at Exh. B (Geotel Report CLEC Fiber Routes and Wire Centers for Atlanta, Chicago, Detroit, Greenville (SC), Los Angeles, Miami and New Orleans MSAs).

[244] *See id.*; *see also* Attach. to AT&T Casto Decl.

[245] *See supra* section III.

[246] *See Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 72.

uniform geographic area, for all categories of special access service.[247] For these reasons, we find it appropriate to temporarily suspend our competitive showing rules for dedicated transport.

C. Arguments Against Suspension of Rules

80. *Broad Assertions Regarding Competition.* Commenters assert that the deregulatory approach of pricing flexibility, as well as the current competitive showing rules, has been sufficient to constrain exclusionary or predatory conduct by LECs to date.[248] For example, Verizon, Qwest, AT&T, and CenturyLink assert that special access prices have fallen since the adoption of pricing flexibility, and that special access outputs have increased.[249] CenturyLink states that special access must be considered in the broader context, as incumbent LECs have been facing substantial business challenges.[250] Thus, absent evidence of a fundamental failure in the current pricing flexibility rules – which commenters believe has not been shown in the record – the Commission should not substantially revise or eliminate those rules.[251]

81. There is insufficient evidence in the record upon which to base general or categorical conclusions regarding the competitiveness of the special access market. As an initial matter, it is not clear how the Commission should consider arguments that market definitions are not relevant because the undefined market is highly competitive. Such arguments would have us presume the outcome at the heart of our inquiry prior to conducting any analysis of market conditions. Categorical assertions about competitiveness are not an adequate basis upon which we can base grants of pricing flexibility, particularly in light of the problems with the current competitive showing requirements,[252] as well as the potentially conflicting evidence in the record about the changes in special access prices in Phase I and Phase II pricing flexibility areas. While incumbent LECs assert that special access prices have fallen in pricing flexibility areas, competitors state that prices, particularly in areas granted Phase II relief, have increased.[253] This evidence is inconclusive; thus, we do not pass judgment on these assertions in this

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[247] *Id.*

[248] *See, e.g.*, AT&T Carlton / Sider Decl. at para. 32; AT&T 2009 PN Reply at 17; Verizon 2009 PN Reply at 4-6; HT / HTSC 2009 PN Reply at 1, 6-7; Qwest 2007 PN Comments at 55; Embarq 2007 PN Reply at 12; USTA 2007 PN Reply at 6; Verizon 2005 NPRM Comments at 6, 36; BellSouth 2005 NPRM Comments at 51.

[249] Qwest 2009 PN Comments at 2 & Decl. of Timothy J. Tardiff & Dennis L. Weisman at paras. 15-21 (Qwest Tardiff / Weisman Decl.); Verizon 2009 PN Comments at 4-5; CenturyLink 2009 PN Reply at 5; AT&T 2007 Comments at 24. For example, Verizon states that, between 2002 and 2006, the prices customers paid for Verizon's DS1 services fell an average of 5.28 percent per year, while the prices paid for Verizon's DS3 services during that same period fell an average of 4.97 percent per year, both in real terms. Verizon 2009 PN Comments at 6 (citing Verizon 2007 PN Comments, Attach. A, Suppl. Decl. of William E. Taylor at para. 7). Similarly, Qwest states that, between 2002 and 2008, prices for DS1 services declined by **[REDACTED]** in Qwest's largest MSAs with Phase I pricing flexibility and **[REDACTED]** in Qwest's largest MSAs with Phase II pricing flexibility, respectively (in real terms). Qwest Tardiff / Weisman Decl. at para. 20. Retail prices for Qwest's DS3 services declined by **[REDACTED]** in Qwest's largest MSAs with Phase I pricing flexibility and **[REDACTED]** in Qwest's largest MSAs with Phase II pricing flexibility (in real terms). Qwest Tardiff / Weisman Decl. at para. 21.

[250] CenturyLink notes that incumbent LECs have been "losing substantial percentages of their landline customers and traffic annually, generally without realizing comparable reductions in operating costs or sunk investments." CenturyLink 2009 PN Reply at 5.

[251] AT&T 2009 PN Comments at 20, 46; Verizon 2005 NPRM Comments at 44-45; Qwest 2007 PN Reply at 14; USTA 2007 PN Reply at 9.

[252] *See supra* section III.

[253] *See, e.g.*, Global Crossing 2009 PN Comments at 4-6; T-Mobile 2007 PN Comments at 7; Sprint 2007 PN Comments at 16-17, 22-23; tw telecom / One Communications 2007 PN Comments at 31-41; COMPTEL 2009 PN Reply at 9-10.

Report and Order. However, given the problems associated with the 1999 competitive showing rules, we do believe that the record contains sufficient disputed evidence to warrant further scrutiny by the Commission. The current competitive showing rules provide only a limited inquiry into the state of competition in a given market, a fact that commenters, including incumbent LECs, concede.[254]

82. Moreover, we do not agree that *WorldCom* or the *Pricing Flexibility Order* compel us to maintain the collocation-based competitive showing rules or a similar standard. In *WorldCom*, the court explicitly affirmed the Commission's discretion to adopt new policy positions, provided that it provides a reasoned analysis to support its decisions.[255] Further, the *WorldCom* court noted that, unless they are statutorily precluded from doing so, agencies have the discretion to make adjustments to their regulations in light of changed circumstances.[256] The court also held that the Commission did not err in basing its policymaking on "predictive forecasts," because the Commission's adoption of the competitive showing rules was a reasonable prediction of how competition for special access might develop in the future.[257] Throughout this Report and Order, we identify the problems associated with the current pricing flexibility rules and explain why suspending the current competitive showings while we conduct a market analysis will enable us to identify a replacement for the competitive showing rules that will allow us to more effectively evaluate requests for pricing flexibility. Thus, we disagree with commenters who assert that precedent requires a different result.

83. *Data Collection Necessary*. We do not agree with commenters that it is necessary to collect additional data prior to suspending our rules.[258] As discussed in section III, above, the existing record contains sufficient evidence to call the continued viability of the collocation-based competitive showing rules into question.[259] We therefore will not allow the inefficiencies resulting from those rules to go unaddressed until we are able to obtain a more extensive data set.[260] In our view, it is appropriate to suspend the competitive showing rules adopted in the *Pricing Flexibility Order* while we undertake a competition analysis to assist us in determining how to assess the presence of actual and potential competition sufficient to discipline special access prices.

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[254] *See, e.g.*, AT&T 2007 PN Comments at 6, 25-26, 51-52; AT&T 2009 PN Comments at 4, 7, 28-29, 39; BellSouth 2005 NPRM Comments at 55; Qwest 2009 PN Comments at 5-7, 25-26, 39; Verizon 2009 PN Comments at 42; BellSouth 2005 NPRM Reply at 21.

[255] *See WorldCom*, 238 F.3d at 460; *see also Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

[256] *See WorldCom*, 238 F.3d at 460.

[257] *See WorldCom*, 238 F.3d at 459 (stating that "it is within the scope of the agency's expertise to make such a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view" (quoting *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991)) (internal quotation marks omitted)).

[258] *See, e.g.*, AT&T Motion to Strike and Reply to Sprint's Late-Filed Opposition to Petitions for Pricing Flexibility, WC Docket No. 05-25 at 1 (filed June 1, 2012) (citing Letter of R. Paul Margie, Wiltshire & Grannis LLP, on behalf of Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed May 23, 2012) (Sprint May 23, 2012 *Ex Parte* Letter)) (AT&T June 2012 Motion to Strike); AT&T 2009 PN Comments at 20, 43 (contending that the Commission may not change the pricing flexibility rules unless commenters "show with actual evidence that long settled and judicially upheld conclusions are no longer valid.").

[259] *See supra* section III.

[260] The Commission issued voluntary data requests in October 2010 and September 2011. *See Special Access Facilities Data Public Notice*, 25 FCC Rcd at 15146; *Special Access Competition Data Public Notice*, 26 FCC Rcd at 14000.

D. Changes in Regulatory Relief During Development of New Rules

84. We note that parties may still take steps to alter the regulatory status of special access services during the pendency of this proceeding. As commenters have noted, the Commission has the power to resolve allegations of unjust or unreasonable rates, terms and conditions through the complaint process in the Act,[261] rather than through a rulemaking proceeding.[262] Parties also may petition for forbearance from any regulation or provision of the Act pursuant to section 10 thereof,[263] or seek a waiver of our rules.[264] The availability of these forms of recourse provides additional support for suspension of our competitive showing rules pending development of an improved method for providing regulatory relief.[265]

V. UNDERTAKING A MARKET ANALYSIS FOR SPECIAL ACCESS REGULATORY RELIEF

A. Future Steps to Analyze Competition for Special Access

85. In this section, we commence a process that will enable us to more effectively determine where regulatory relief is appropriate. In the coming months, we will undertake a robust market analysis to assist us in determining how best to assess the presence of actual and potential competition for special access that is sufficient to discipline prices. Our analysis will follow the collection of additional data and

[261] 47 U.S.C. §§ 206, 207, 208.

[262] *See, e.g.*, CenturyLink 2009 PN Reply at 6 ("If there are credible allegations from purchasers or competitors that particular rates or practices are unjust or unreasonable, then the Commission (or a federal court) could address the problem through the complaint process in sections 206 and 207 of the Communications Act."); USTA 2007 Comments at 14 (stating that "if any parties truly believe that special access rates are unjust or unreasonable, they can challenge those rates before the Commission under Section 208 of the Communications Act"). *But see* Letter from John J. Heitmann, Counsel, XO Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-25, 06-125, 06-147, at 1-5 (filed Oct. 12, 2007) (stating that "special access rates, terms and conditions imposed by the Bells and other price cap LECs should be addressed in this rulemaking proceeding rather than through the Commission's section 208 complaint process").

[263] 47 U.S.C. § 160.

[264] *See, e.g.*, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005) (*Verizon Advanced Services Waiver Order*); *SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules*, WC Docket No. 03-250, Order, 22 FCC Rcd 7224 (Wireline Comp. Bur. 2007) (*SBC Advanced Services Waiver Order*); *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, WC Docket No. 06-187, Order, 22 FCC Rcd 7482 (Wireline Comp. Bur. 2007) (*Qwest Pricing Flexibility Waiver Order*). Each of these orders permitted a carrier to obtain Phase I pricing flexibility for packet-based advanced services in areas where the carrier had already qualified for Phase I or Phase II pricing flexibility for other special access services.

[265] As discussed above, contrary to the predictive judgments underlying the adoption of the existing collocation triggers as proxies for sufficient special access competition, we find that those triggers are a poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices throughout an MSA. *See supra* Section III. Where, as here, we find systemic issues with our special access rules, we find it reasonable for us to take a systemic, rather than case-by-case, approach to resolve them. *Compare Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 17 FCC Rcd 24952, 24978, para. 49 (2002) ("Using our enforcement authority to address such a systemic problem would not be an efficient use of the Commission's resources."), *with infra* Pai Statement at 105-06 (contending that currently available case-by-case remedies, such as the complaint process noted above, provide sufficient avenues for relief and obviate the need to suspend our rules).

an opportunity for public comment. As described below, there is widespread accord in the record on the appropriateness of collecting additional data to inform our future actions.

86. The market analysis we will undertake in the coming months may identify reliable proxies for competition for special access services, which we could adopt in lieu of the 1999 competitive showings. Our analysis may also provide evidence that changes in our regulatory approach are warranted in particular geographic areas. At this time, we do not exhaustively specify the factors that will comprise our market analysis: these will be subject to comment by interested parties in an upcoming notice.[266] We anticipate that the analysis will be a one-time assessment of the competitive conditions in the special access market; however, we do not foreclose the possibility that further analyses may be needed in the future. In any event, we will issue a comprehensive data collection order within 60 days to facilitate this market analysis.

B. Benefits of a More Complete Market Analysis

1. A Market Analysis is Consistent with Agency and Court Precedent

87. We concur with commenters who point out that use of market analysis in the special access context is consistent with Commission precedent.[267] The Commission historically has conducted an examination of market conditions in several instances to assess competition for telecommunications services. In a series of orders in the *Competitive Carrier* proceedings, the Commission established a framework to evaluate competition in telecommunications markets and determine whether deregulatory treatment of certain carriers is warranted.[268] In those orders, the Commission performed a structural

[266] *See infra* V.4 (discussing factors to be considered in market analysis).

[267] *See, e.g.*, Qwest 2007 PN Comments at iii, 5; XO 2009 PN Comments at 3-5; tw telecom 2009 PN Reply at 7-8.

[268] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier First Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982) (*Competitive Carrier Second Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Order on Reconsideration, 93 FCC 2d 54 (1983) (*Competitive Carrier Order on Reconsideration*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983) (*Competitive Carrier Third Further Notice*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Third Report and Order, 48 Fed. Reg. 46791 (1983) (*Competitive Carrier Third Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fourth Report and Order, 95 FCC 2d 554 (1983) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (*AT&T v. FCC*), *cert. denied*, *MCI Telecomms. Corp. v. AT&T*, 509 U.S. 913 (1993); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Competitive Carrier Sixth Report and Order*), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff'd*, *MCI v. AT&T*, 512 U.S. 218 (1994) (*MCI v. AT&T*) (collectively, the *Competitive Carrier* proceedings).

market analysis to distinguish between "dominant carriers," which "possess market power (*i.e.*, the power to control price)," and "non-dominant carriers," which "do not possess power over price."[269] The Commission focused its inquiry on certain "clearly identifiable market features," including a carrier's market share, number and size distribution of competing firms, the nature of competitors' barriers to entry, the availability of reasonably substitutable services, the level of demand elasticity, and whether the firm controlled bottleneck facilities.[270] This analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.[271] The Commission subsequently applied the same framework to reclassify AT&T as non-dominant in the interstate interexchange service market, finding that AT&T no longer possessed individual market power with respect to those services.[272]

88. In the 1997 *LEC Classification Order*, the Commission modified its framework for dominance / non-dominance analyses to bring the framework into accord with the antitrust analysis laid out in the 1992 Merger Guidelines,[273] a precursor to the 2010 Horizontal Merger Guidelines that are in use today.[274] In that order, the Commission stated that the assessment of competitive conditions requires a thorough analysis which begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market

[269] *Competitive Carrier First Report and Order*, 85 FCC 2d at 20, para. 54.

[270] *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3274-75, para. 5 (citing *Competitive Carrier First Report and Order*, 85 FCC 2d at 21-22, paras. 56-59). Of particular relevance to this discussion, the Commission concluded in the *Competitive Carrier First Report and Order* that "[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities," because it provides carriers with the ability "to impede access of its competitors to those facilities" and is therefore treated as "prima facie evidence of market power requiring detailed regulatory scrutiny." *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, para. 58.

[271] In the *Competitive Carrier First Report and Order*, the Commission found that "firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." *Competitive Carrier First Report and Order*, 85 FCC 2d at 31, para. 88; *see also* 47 U.S.C. §§ 201(b), 202(a).

[272] Among the factors the Commission cited in support of its finding were: (1) AT&T's market share had been falling steadily for ten years, and had decreased to approximately "55.2 and 58.6 percent in terms of revenues and minutes respectively;" (2) AT&T faced at least three nationwide facilities-based providers and hundreds of smaller competitors; (3) AT&T's competitors possessed the ability to accommodate a substantial number of new customers on their networks with "little or no investment immediately, and relatively modest investment in the short term," (*i.e.*, that they had sufficient excess capacity to constrain AT&T's pricing behavior); (4) "virtually all customers . . . have numerous choices of equal access carriers;" (5) both business and residential customers were highly demand elastic and frequently switched carriers; and (6) AT&T had not controlled local bottleneck facilities for over ten years. *See AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3303-46, paras. 57-137.

[273] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756 (1997) (*LEC Classification Order*), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, CC Docket Nos. 96-149 and 96-61, 14 FCC Rcd 10771 (1999); *AT&T Domestic Non-Dominance Order*, 11 FCC Rcd at 3293-3309, paras. 38-73; *see also, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986).

[274] FTC/DOJ Horizontal Merger Guidelines at 2. The FTC/DOJ Horizontal Merger Guidelines describe the main analytical techniques and the types of evidence typically relied upon by the DOJ and the FTC to predict whether a horizontal merger may substantially lessen competition. *Id.* at 1.

power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.[275]

89. More recently, the Commission has undertaken market analysis to assess the extent of competition in both merger proceedings and in the evaluation of forbearance petitions.[276] For instance, in its analysis of the proposed AT&T/ BellSouth and Verizon / MCI mergers, the Commission considered whether the mergers would reduce existing competition, as well as their likely effects on the market power of dominant firms in the relevant communications markets and the mergers' effects on future competition.[277] Similarly, in the *Qwest Phoenix Forbearance Order* the Commission employed a structural market analysis akin to that of the *Competitive Carrier* cases to evaluate Qwest's petition for forbearance from certain wholesale and retail regulations in the Phoenix, Arizona, MSA.[278] Additionally,

[275] *LEC Classification Order*, 12 FCC Rcd at 15774-75, paras. 26-28 (explaining that the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 938 (1981); FTC/DOJ Horizontal Merger Guidelines at 1-3.

[276] *See, e.g.*, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (*Qwest Phoenix Forbearance Order*), *aff'd Qwest Corp. v. Fed. Commc'ns Comm'n*, No. 10-9543 (10th Cir. Aug. 6, 2012), *available at* http://www.ca10.uscourts.gov/opinions/10/10-9543.pdf; *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5675-76, paras. 23-26 (2007) (*AT&T/BellSouth Merger Order*); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18303-04, paras. 20-23 (2005) (*SBC/AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18446-47, paras. 20-23 (2005) (*Verizon/MCI Merger Order*); *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4248-49, paras. 24, 26 (2011) (*Comcast/NBC Merger Order*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007).

[277] *AT&T/BellSouth Merger Order* at 5673-74, para. 21; *Verizon/MCI Merger Order* at 18444-45, para. 18.

[278] *See Qwest Phoenix Forbearance Order* at 8623-24, paras. 1-3. The Commission noted that, in a series of orders beginning with the 2005 grant of forbearance to Qwest in the Omaha MSA, it had moved away from using a market power analysis to evaluate the merits of petitions for forbearance. *Qwest Phoenix Forbearance Order* at 8630-32, paras. 16-20. *See also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (*Qwest Omaha Forbearance Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) (*Qwest v. FCC*); *Request for Additional Comment and Data Related to Qwest Corporation's Petition for Forbearance and Certain Network Element and Other Obligations in the Phoenix, Arizona MSA*, WC Docket No. 09-135, Public Notice, 25 FCC Rcd 3720 (Wireline Comp. Bur. 2010). However, in light of subsequent market developments, the Commission opted to return to a traditional market power framework to evaluate competition in telecommunications markets in forbearance proceedings. *Qwest Phoenix Forbearance Order* at 8642-43, para. 37. In practice, the factors that the Commission has assessed as part of its market analysis have varied depending on the data available. *See, e.g.*, *Qwest Phoenix Forbearance Order* at 8634, para. 26 ("the Commission has acknowledged that it did so as (continued….)

a market analysis is consistent with the investigation performed by the DOJ and FTC to assess whether a horizontal merger could adversely impact competition in relevant markets.[279]

90. In the *Pricing Flexibility Order*, the Commission declined to require incumbent LECs to perform a complete market analysis as part of the carrier's application for pricing flexibility and instead, without the benefit of a fulsome market analysis, adopted proxies for competition that were intended to measure whether actual or potential competition was sufficient to ensure just and reasonable rates, terms and conditions for special access services.[280] As discussed above and based on the record in this proceeding, we have suspended grants of pricing flexibility on the basis of these proxies because we find that the geographic market over which relief is granted, MSAs, do not correspond to the scope of competitive entry and serious question have been raised concerning whether the presence of collocation and competitive transport are reliable indicators of the presence of competitive channel termination services.[281] The process we begin today may well assist in developing new proxies for special access competition, which could be employed going forward to evaluate petitions for pricing flexibility. Once we have had the opportunity to collect and analyze additional data, we will be better positioned to determine what specific showings price cap carriers must make in their petitions for pricing flexibility and what information they could submit to satisfy those showings.[282]

2. A Market Analysis Will Provide Analytical Precision

91. Several commenters recommend that, prior to adopting a new analytical framework, we collect competitive data to assess whether the current competitive showing rules are a reasonably accurate proxy for the presence of competition.[283] Undertaking a market analysis will allow the Commission to more precisely determine where competition exists, or could potentially exist, and to develop better tests for regulatory relief to replace the current collocation-based approach. For example, as described above, some commenters observe that the collocation-based competitive showings do not account for sources of intermodal and/or intramodal competition that do not collocate in incumbent LEC facilities.[284] Other

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part of a broader evaluation of competition and as a reflection of how parties submitted data in that proceeding" (quoting *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(C)(3) and 252(D)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1966, para. 12 n.41 (2007)) (internal quotation marks omitted)); *Verizon/MCI Merger Order* at 18466-67, para. 62 (altering market analysis due to lack of data in record).

[279] *See supra* n.104; FTC/DOJ Horizontal Merger Guidelines at 1; William C. Holmes, 1 *Intellectual Property and Antitrust Law* § 9:4 (Thomson Reuters 2012).

[280] *Pricing Flexibility Order*, 14 FCC Rcd at 14271-72, para. 90. The Commission determined that, as compared to establishing a proxy for special access competition: (1) a market analysis would present administrative challenges; and (2) the costs of delaying deregulatory action outweighed any costs associated with deregulating special access markets before competition had fully developed. *Pricing Flexibility Order*, 14 FCC Rcd at 14271-72, para. 90.

[281] *See supra* section III.

[282] Commenters state that the Commission could analyze a representative sample set of data to assess what further action is warranted. *See, e.g.*, AT&T 2009 PN Comments at 39-44; Qwest 2009 PN Comments at 39. Commenters assert that it would be too burdensome for the Commission to perform such a market analysis for every petition for flexibility that is filed. *See, e.g.*, Qwest 2009 PN Comments at 39.

[283] *See* AT&T 2009 PN Comments at 28; Embarq 2007 PN Reply at 13-15; NoChokePoints 2009 PN Comments at 1-2, 5-12; Qwest 2009 PN Comments at 25-26, 39; Sprint 2009 PN Comments at 4-6; Verizon 2009 PN Comments at 42; XO 2009 PN Comments at 1-5.

[284] *See, e.g.*, AT&T 2009 PN Comments at 38, 43-44; Iowa Telecom / Valor 2005 NPRM Comments at 19; Verizon 2005 NPRM Comments at 49-50; Qwest 2007 PN Reply at 32; Verizon 2009 PN Reply at 9-10, 20. Examples of (continued….)

commenters raise concerns that the 1999 competitive showing rules overlook competitors who could potentially enter the market in the near term or in the more distant future.[285] In contrast to our current approach, a market analysis would seek to identify significant current and potential market participants, and consider their impact when assessing the level of competition in a market.[286]

92. Several commenters state that a single market characteristic (e.g., high special access rates or carrier revenues, large market share) is generally not sufficient on its own to signify whether a given market is competitive.[287] For example, AT&T and Verizon both assert that the Commission should not rely on market share as the basis for concluding that a given market lacks competition, because market share is a static measure that can understate the impact of competitive alternatives in dynamic markets.[288] We agree that the Commission must conduct a more comprehensive analysis of the state of competition prior to adopting replacement competitive proxies or making other changes to the ways that incumbent LECs may obtain regulatory relief in the provision of special access services. A market analysis will enable us to make a multi-faceted assessment of competition that considers a variety of factors, including both price and non-price effects.[289] Additionally, this type of fact-specific analysis is in line with current approaches to competition policy.[290]

3. A Market Analysis Will Foster Broadband Deployment and Competition

93. Finally, a comprehensive market analysis will help us to take future steps to support broadband deployment and competition. In the *Qwest Phoenix Forbearance Order*, the Commission found that, "by using the more comprehensive antitrust-based analysis that the Commission frequently has used in past proceedings, and that the [FTC and DOJ] regularly use to measure competition, we ensure that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets."[291] Citing the National Broadband Plan, the Commission

(Continued from previous page)
such sources of competition could include, for example, fixed wireless, cable, and non-collocating wireline providers. For further discussion of this issue, see *infra* paras. 98-100.

[285] *See, e.g.*, AT&T 2009 PN Comments at 40-43, 46; AT&T 2009 PN Reply at 26-28; CenturyLink 2009 PN Reply at 4; Embarq 2007 PN Reply at 12; Qwest 2007 PN Reply at 33-34; Verizon 2009 PN Reply at 9, 26-27. For further discussion of this issue, see *infra* paras. 98-100

[286] *See* FTC/DOJ Horizontal Merger Guidelines at 15-16.

[287] *See, e.g.*, AT&T 2009 PN Comments at 18, 42-43; Qwest 2009 PN Comments at 22-25; Verizon 2009 PN Comments at 9-10, 17, 27; AT&T 2009 PN Reply at 34-35; CenturyLink 2009 PN Reply at 3-4; Free State Foundation 2009 PN Reply at 4; tw telecom 2009 PN Reply at 21-23; Verizon 2009 PN Reply at 7, 30-32; XO 2009 PN Reply at 3.

[288] AT&T 2009 PN Comments at 18, 42-43; Verizon 2009 PN Comments at 9-10, 17, 27; AT&T 2009 PN Reply at 34-35; Verizon 2009 PN Reply at 7, 30-32. *See also infra* para. 101.

[289] In the *LEC Classification Order*, for example, the Commission considered several factors as part of its structural competition analysis, including the relevant product and geographic markets, market characteristics (including market shares), the potential for the exercise of market power, and whether the exercise of market power could be counteracted by potential entry by competitors. *See LEC Classification Order*, 12 FCC Rcd 15756, 15774-77, paras. 28-29; *see* FTC/DOJ Horizontal Merger Guidelines at 1-2.

[290] *See* FTC/DOJ Horizontal Merger Guidelines; Holmes, *supra* n.279 at § 9:4; Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 Antitrust L.J. 187 (2000).

[291] *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8645, para. 40; *see also*, *e.g.*, MAG-Net 2009 PN Reply at 7-8 ("To ensure that an analysis of market competition in the special access market does not further deprive disenfranchised communities of competition in the broadband market, it is critical that competition is measured on a more granular level."); Sprint 2009 PN Reply at 11 (arguing that incumbent LEC market power "must be addressed, because the harm caused by this trend extends well beyond just special access services - it affects important (continued….)

noted that "regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers."[292]

94. Special access circuits are a particularly important input for carriers' broadband service offerings. As the National Broadband Plan found, the costs associated with purchasing special access circuits can be a significant expense that impacts a carrier's ability to provide affordable broadband service, particularly to smaller, rural communities.[293]

95. A market analysis will enable us to ensure that appropriate regulatory relief is granted in those markets where competitive conditions justify it. For example, we expect that our analysis will aid in determining whether purchasers can obtain special access circuits at just and reasonable prices.[294] This inquiry could provide insight into challenges that carriers may face in deploying broadband and what actions, if any, are needed to respond to those challenges.

4. Factors to be Considered in Market Analysis

96. Some commenters, in particular incumbent LECs, recommend specific factors or considerations they believe the Commission should include in a market analysis. We address several of these recommendations below.

a. Analysis Must Be Forward-Looking and Consider Various Sources of Competition

97. As detailed below, commenters state that any market analysis we conduct must be forward-looking and account for significant competitors in a market.[295] We agree.

98. In our view, a comprehensive market analysis will best facilitate a complete inquiry into the existence of competition in a given market, including sources of intermodal and intramodal competition, potential market entrants, uncommitted entrants, carriers that self-supply their own special access, and

(Continued from previous page)
downstream services, as well"); Letter from Colleen Boothby, Ad Hoc, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, WT Docket No. 11-65 at 5 (filed June 13, 2011) ("Ad Hoc's concern is that price squeezes can be used to impede competition and exploit ratepayers before (and regardless of whether) competitors are completely forced from downstream markets.") (Ad Hoc June 13, 2011 *Ex Parte* Letter).

[292] *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8645, para. 40 (quoting Federal Communications Commission, Omnibus Broadband Initiative, Connecting America: The National Broadband Plan 47 (March 2010) (NBP), *available at* http://www.broadband.gov/plan (last visited Aug. 14, 2012)). We note that in the *Qwest Phoenix Forbearance Order*, the Commission stated that "a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest's petition in this proceeding. For advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II regulation." *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8644, para. 39.

[293] NBP at 48 (Recommendation 4.8). The National Broadband Plan noted that, for example, a competitive provider with its own fiber optic network in a city will frequently purchase special access connections from the incumbent provider in order to serve customer locations that are "off net." NBP at 48; *see* tw telecom 2007 PN Comments at 35-36 (stating that incumbent LEC discounted Ethernet prices are also substantially higher than competitor's wholesale rates, which prevents tw telecom from providing Ethernet to retail consumers).

[294] *See* 47 U.S.C. §§ 201(b), 202(a).

[295] AT&T 2009 PN Comments at 40-43, 46; AT&T 2009 PN Reply at 26-28; CenturyLink 2009 PN Reply at 3-4; Embarq 2007 PN Reply at 12; Iowa Telecom/Valor 2005 NPRM Comments at 19-20; Qwest 2007 PN Reply at 33-34; Verizon 2009 PN Comments at 14; Verizon 2009 PN Reply at 9-10, 26-27.

non-facilities-based competitors. This analysis also will consider the impact of competitors that do not collocate in an incumbent's wire center.[296]

99. For instance, the 2010 Horizontal Merger Guidelines contain a detailed process employed to identify participants in the relevant market.[297] Pursuant to the 2010 Horizontal Merger Guidelines, an identification of market participants includes all firms that currently earn revenues in the relevant market.[298] A firm may be considered to be a market participant even if it does not currently earn revenues, but it is "committed to entering the market in the near future,"[299] or if the firm is not a current producer in the relevant market, but "would very likely provide rapid supply responses with direct competitive impact in the event of a [small but significant and non-transitory increase in price (SSNIP)], without incurring significant sunk costs."[300] Thus, in those instances where a competitor, such as a cable or fixed wireless provider, can quickly enter the market and respond to customer demand, a market analysis would enable us to consider the likely impact of that entry on competition.[301]

100. Moreover, a market analysis allows for specific, economically rigorous, and factually specific inquiries regarding potential competition, a factor that price cap LECs such as Verizon and AT&T contend should be included in any framework we adopt.[302] A market analysis of potential competition assesses whether a firm is perceived to be a potential competitor, exerting a price-constraining effect on firms currently participating in the market, even though it is not currently participating in the market.[303] We agree with commenters that our analysis of competitive conditions

[296] *See, e.g.*, Embarq 2007 PN Reply at 25-26; Verizon PN 2007 Comments at 48-50; AT&T 2009 PN Reply at 17.

[297] American Bar Association, Section on Antitrust Law, *Antitrust Law Developments* 346 (7th Ed. 2012) (citing FTC/DOJ Horizontal Merger Guidelines at 7-15) (*2012 Antitrust Law Developments*).

[298] FTC/DOJ Horizontal Merger Guidelines at 15. This also includes firms that self-supply their own product. *2012 Antitrust Law Developments* at 346.

[299] FTC/DOJ Horizontal Merger Guidelines at 15.

[300] FTC/DOJ Horizontal Merger Guidelines at 15-16. Such competitors, known as "rapid entrants," may include (1) firms that produce the relevant product but do not sell it in the relevant geographic market; (2) firms that produce but do not currently sell the relevant product to a targeted group of customers that define the relevant market, but could easily and rapidly begin to do so; and (3) firms that have the necessary assets and readily available "swing" capacity to begin producing the relevant product. *2012 Antitrust Law Developments* at 347.

[301] *See* Verizon 2009 PN Comments at 17 ("Once competitors have deployed fiber or wireless networks in an area, they are able cost effectively to use or extend those networks to serve customers in individual buildings where there is sufficient demand."); Letter from Glenn T. Reynolds, Vice President, Policy, US Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, GN Docket No. 09-51, Attach. at 5, 23 (filed July 16, 2009) (discussing how competitive fiber networks can cost effectively serve new customers); Darren S. Tucker, *Potential Competition Analysis Under the 2010 Merger Guidelines*, 12 Sedona Conf. J. 273 (2011) (discussing the evolution of "actual competition" and "potential competition" in antitrust law analysis).

[302] AT&T 2009 PN Comments at 24-25 & n.38 (citing *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5682-83, paras. 41-42) (discussing the Department of Justice's required divestitures of merging parties' facilities based on a potential competition analysis)); AT&T 2009 PN Reply at 19-29; AT&T 2007 PN Reply at 4-5; BellSouth 2005 NPRM Reply at 32-37; Embarq 2007 PN Reply at 12 & n.32 (citing Qwest 2007 Comments at 13 & nn.32-33 (citing *United States Telecom Association v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) (*USTA II*); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2558-59, para. 43 (2005) (*TRRO*)); Qwest 2009 PN Reply at 7; Verizon 2009 PN Comments at 9-10, 17, 27.

[303] *See Tucker*, *supra* note 301 at 279; Gregory J. Werden & Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 Antitrust L.J. 109 (2010). Firms that are not poised to enter the market rapidly or that must incur significant sunk costs to enter are considered potential competitors under the (continued….)

should incorporate an assessment of potential competition. We also agree that barriers to market entry should be considered.[304] Entry is an important consideration in a structural analysis, as the exercise of market power is unlikely where entry barriers are low and incumbents cannot profitably raise price or otherwise reduce competition to a level below that of a competitive market.[305] In the past, the Commission has considered potential competition and barriers to entry as part of its market analysis.[306]

101. Further, we concur with commenters that the multi-faceted and forward-looking analysis of competition we will undertake would be inadequate if it focused solely on market share or building counts.[307] By examining factors such as the potential for competitive effects, market entry, and potential competition, a market analysis is a forward-looking alternative to the current competitive showing rules or any like standard.[308] That being said, we must carefully balance the benefits of relying on solid, if historical data, against the risks associated with placing too much weight on speculative data sources. We will continue to consider our future data collection needs with these points in mind.

b. Approach that Enhances Consumer Welfare

102. We agree with commenters who assert that the Commission must conduct its market analysis in light of its broader objectives for the telecommunications industry.[309] For example, Verizon notes that pricing flexibility was among several deregulatory actions taken by the Commission in the 1990s with the goal of encouraging innovation, cost savings, and efficiencies.[310]

(Continued from previous page)
2010 Merger Guidelines only if entry by the firm "would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *2012 Antitrust Law Developments* at 347 n.113 (quoting FTC/DOJ Horizontal Merger Guidelines at 28).

[304] *See, e.g.*, PAETEC 2007 PN Comments at 11 (stating that inherent barriers to building and deploying fiber or copper special access facilities include the costs of trenching and the need to obtain conduit space, rights of way, and access to buildings); ATX *et al.* 2007 PN Comments at 25 (stating that it is rarely economically feasible for competitive carriers to construct loops at the DSO, DSl, or DS3 capacity levels); tw/One Communications 2007 PN Comments at 13 (stating that carriers like One Communications find the cost of loop deployment prohibitive in almost all cases).

[305] FTC/DOJ Horizontal Merger Guidelines at 28; Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 Yale J. on Reg. 111 (1984).

[306] *See, e.g.*, *Competitive Carrier First Report and Order*, 85 FCC 2d at 21, paras. 57-58; *LEC Classification Order*, 12 FCC Rcd at 15775 para. 28; *AT&T Non-Dominance Order*, 11 FCC Rcd at 3303-05, paras. 57-62; *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8635, para. 28; *Comcast/NBC Merger Order*, 26 FCC Rcd at 4261, n.123; *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5677, para. 27; *Verizon/MCI Merger Order*, 20 FCC Rcd 18446, para.21.

[307] *See, e.g.*, Verizon 2009 PN Comments at 9-10; AT&T 2009 PN Comments at 18-19, 42-43; FreeState 2009 PN Reply at 4; CenturyLink 2009 PN Reply at 3-4; AT&T 2009 PN Reply at 34-35; Qwest 2009 PN Reply at 7; Verizon 2009 Reply at 24-25, 30-32.

[308] As commenters note, the collocation-based competitive showing rules focus only on the current existence of sunk competition, and only a subset of those existing competitors. *See, e.g.*, Sprint 2007 PN Comments at 16; Public Knowledge 2009 PN Reply at 3-4; *supra* paras. 98-100. If we were to employ a similar proxy for competition, we risk making simplistic classifications based on a static view of the market at the time the criteria are established.

[309] AT&T 2009 PN Reply at 17; Verizon 2009 PN Reply at 44.

[310] Verizon 2009 PN Reply at 44.

103. The major purpose of the 1996 Act was to establish "a pro-competitive, deregulatory national policy framework."[311] Indeed, among its primary goals were "opening the local exchange and exchange access markets to competitive entry" and "promoting increased competition in telecommunications markets that are already open to competition, including the long-distance services market."[312] We undertake an analytical process to assess the level of competition in the special access market with these goals in mind. For example, our analysis may indicate that further regulatory relief is warranted in areas where competition exists, but is not captured by the current competitive proxies. As detailed above, the competitive showings adopted in the *Pricing Flexibility Order* are both over- and under-inclusive, resulting in inaccurate assessments of whether actual and potential competition is sufficient to constrain special access prices in the areas granted relief.[313] Indeed, given the unreliable nature of the competitive showing requirements adopted in 1999, we believe a market analysis will aid us in granting deregulation in areas where actual and potential competition is sufficient to constrain prices. A nuanced market analysis will also allow us to better balance the potential costs of regulating too heavily against the potential harms of failing to undertake appropriate regulation where it is needed.[314]

c. Dominance / Non-Dominance Classification

104. Finally, incumbent LECs assert that special access pricing flexibility should not be treated as akin to the non-dominance analyses undertaken by the Commission in the *Competitive Carrier* proceeding.[315] Further, AT&T argues that, under a non-dominance framework, upon a finding that an incumbent lacked market power, the Commission would have to reclassify the carrier as non-dominant and relieve its dominant carrier obligations.[316] We agree with AT&T that, once we have performed a

[311] Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 104-230, at 113 (1996) (Conf. Rep.) (Joint Explanatory Statement).

[312] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order*,* 11 FCC Rcd 15499, 15505, 16144-45, paras. 3, 1327-30 (1996) (*First Local Competition Order*) (subsequent history omitted).

[313] *See supra* section III; *cf.* Stephen G. Wood, Don C. Fletcher & Richard F. Holley, *Regulation, Deregulation, and Re-Regulation: An American Perspective*, 1987 B.Y.U. L. Rev. 381, 386-87 (1987) (noting arguments that, among other things, a deregulatory approach may not control monopoly power or "excess profits" and could provide inadequate information).

[314] *See, e.g.*, *Pricing Flexibility Order*, 14 FCC Rcd at 14271-72, para. 90; Office of Management and Budget, Office of Information and Regulatory Affairs, 2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 4 (June 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf (stating that "careful consideration of costs and benefits is best understood as a way of ensuring that regulations will improve social welfare, above all by informing design and development of various options so as to identify opportunities for both minimizing the costs of achieving social goals (cost-effectiveness) and maximizing net social benefits (efficiency)"); *See* AT&T 2009 PN Reply at 17-18; HT / HTSC 2009 PN Reply at 5; Verizon 2005 NPRM Reply at 37-38 (noting that the Commission's Part 69 rules impose costs on price cap LECs by limiting their ability to develop rate structures in response to market forces).

[315] *See, e.g.*, AT&T 2009 PN Comment at 7, 25-28. They argue that a non-dominance analysis is inappropriate in the special access context because "the pricing flexibility rules are merely an incremental measure within the context of dominant carrier regulation." AT&T 2009 PN Comment at 25-26. Commenters also contend that it is not necessary or administratively feasible for the Commission to determine whether "actual and potential competition extends to every nook and cranny of an MSA." AT&T 2009 PN Comment at 23-26; *see also* SBC 2005 NPRM Reply at 55; Qwest 2009 PN Comment at 29. Rather, it is sufficient that significant competition exists in areas of high demand. AT&T 2009 PN Comment at 27; Verizon 2009 PN Comment at 10-12.

[316] AT&T 2009 PN Comment at 27-28.

broader evaluation of competitive conditions, our analysis may show that a carrier classified as dominant does not possess market power as defined in the *Competitive Carrier* proceeding for a particular special access service in a geographic area. In that case, the Commission may ultimately conclude that it is appropriate to grant regulatory relief in the form of non-dominance treatment for the particular service and geographic area. We will determine at a future date what criteria the Commission will consider to assess whether a finding of non-dominance for special access service is warranted in a given area.[317]

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

105. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Certification

106. As required by the Regulatory Flexibility Act (RFA),[318] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *2005 Special Access NPRM*.[319] The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *2005 Special Access NPRM*, including comments on the IRFA.

107. As required by Section 603 of the RFA, the Commission has prepared a Final Regulatory Flexibility Certification (FRFC) of the expected impact on small entities of the requirements adopted in the Report and Order, which is set forth in Appendix B.[320] The Commission will send a copy of the Report and Order, including the FRFC, to the Chief Counsel for Advocacy of the Small Business Administration.

C. Congressional Review Act

108. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[321]

VII. ORDERING CLAUSES

109. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201, 202, 203, 204, 205, this Report and Order is ADOPTED.

110. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set forth in Appendix A, and such rule amendments shall be effective 30 days after the date of publication of the rule amendments in the Federal Register.

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[317] It is likely that any finding of non-dominance would be granted in a limited geographic area. Further, we will determine what protections, if any, are necessary to prevent overly broad findings of non-dominance (for example, where a carrier "ties" the purchase of special access in one market to a purchase of special access in another market, or the purchase of a different product).

[318] *See* 5 U.S.C. § 603(a).

[319] *See Special Access NPRM*, 20 FCC Rcd at 2037-40, paras. 134-146.

[320] *See* 5 U.S.C. § 603(a).

[321] *See* 5 U.S.C. § 801(a)(1)(A).

111. IT IS FURTHER ORDERED that section 1.774(f)(1) of the Commission's rules, 47 C.F.R. § 1.774(f)(1), is SUSPENDED until the amendments set forth in Appendix A are effective.

112. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 C.F.R. §§ 1.4(b)(1), 1.103(a), this Report and Order is EFFECTIVE upon release.

113. IT IS FURTHER ORDERED that the Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

114. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation continues to read as follows:

Authority: 15 U.S.C. 79 *et seq*., 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r) and 309.

2 Delete Section 1.774 paragraph (f)(1) and reserve it for future use.

§ 1.774 Pricing flexibility

* * * * *

(f) * * *

(1) reserved for future use.

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APPENDIX B

FINAL REGULATORY FLEXIBILITY CERTIFICATION

115. Final Regulatory Flexibility Certification. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[5]

116. This *Report and Order* suspends, on an interim basis, rules allowing for automatic grants of pricing flexibility for special access services in light of significant evidence that these rules, adopted in 1999, are not working as predicted, and widespread agreement across industry sectors that these rules fail to accurately reflect competition in today's special access markets.[6] Because the rules are suspended, this action imposes no recordkeeping or compliance requirements on any entities. Therefore, there is no impact of this action on small entities.

117. The Commission commits in the *Report and Order* to undertake a robust market analysis to assist in determining how best to assess the presence of actual and potential competition for special access that is sufficient to discipline prices. The *Report and Order* does not, however, exhaustively specify the factors that will comprise the market analysis: these will be subject to comment by interested parties in an upcoming notice. Therefore, as with the suspension of rules addressed in the preceding paragraph, this action imposes no recordkeeping or compliance requirements on any entities.

118. Therefore, we certify that the requirements of this *Report and Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Report and Order* including a copy of this final certification in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[7] In addition, the *Report and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.[8]

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[1] The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] 5. U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[5] Small Business Act, 15 U.S.C. § 632.

[6] *See* 47 C.F.R §§ 69.701 *et seq.*

[7] *See* 5 U.S.C. § 801(a)(1)(A).

[8] *See* 5 U.S.C. § 605(b).

APPENDIX C

LIST OF COMMENTERS

WC Docket No. 05-25
RM-10593

2005 NPRM Commenters

Commenter	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
American Petroleum Institute	API
AT&T Corporation	AT&T
ATX Communications Services, Inc.; BridgeCom International, Inc.; Broadview Networks, Inc.; Pac-West Telecom, Inc.; US LEC Corp.; U.S. Telepacific Corp. d/b/a Telepacific Communications	ATX *et al.*
BellSouth Corporation	BellSouth
Broadwing Communications, LLC & Savvis Communications Corporation	Broadwing / Savvis
BT Americas Inc.	BT
CenturyTel, Inc.	CenturyTel
COMPTEL / ALTS; Global Crossing North America, Inc.; NuVox Communications	CompTel / ALTS *et al.*
Ionary Consulting; NationsLine Inc.; Brahmacom; Fitch Affordable Telecom	Ionary *et al.*
Iowa Telecommunications Services, Inc. and Valor Telecommunications of Texas, L.P.	Iowa Telecom / Valor
New Jersey Division of the Ratepayer Advocate	NJ DRC
Nextel Communications Inc.	Nextel
PAETEC Communications, Inc.	PAETEC
Qwest Communications International Inc.	Qwest
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
Time Warner Telecom	tw telecom
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon
WilTel Communications, LLC	WilTel
XO Communications, Inc.	XO

2005 NPRM Reply Commenters

Commenter	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc

Commenter	Abbreviation
American Petroleum Institute	API
ATX Communications Services, Inc.; BridgeCom International, Inc.; Broadview Networks, Inc.; Pac-West Telecom, Inc.; US LEC Corp.; U.S. Telepacific Corp. d/b/a Telepacific Communications	ATX *et al.*
BellSouth Corporation	BellSouth
Broadwing Communications LLC & Savvis Communications Corporation	Broadwing / Savvis
BT Americas Inc.	BT
COMPTEL; Global Crossing North America, Inc.; NuVox Communications	COMPTEL *et al.*
New Jersey Division of the Ratepayer Advocate	NJ Ratepayer Advocate
Nextel Communications Inc.	Nextel
Office of Advocacy, U.S. Small Business Administration	SBA
Qwest Communications International Inc.	Qwest
SBC Communications Inc.	SBC
Sprint Corporation	Sprint
Time Warner Telecom	tw telecom
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon
WilTel Communications, LLC	WilTel
XO Communications, Inc.	XO

2005 NPRM IRFA Commenters

Commenter	Abbreviation
Office of Advocacy, US Small Business Administration	SBA

2007 Refresh the Record Pleadings

Commenter	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
American Petroleum Institute	API
AT&T Inc.	AT&T
ATX Communications, Inc.; Bridgecom International, Inc.; Broadview Networks, Inc.; Cavalier Telephone, LLC; Deltacom, Inc.; Integra Telecom, Inc.; Lightyear, Inc.; McLeod USA Telecommunications Services, Inc., Penn Telecom, Inc.; RCN	ATX *et al.*

Commenter	Abbreviation
Telecom Services, Inc.; SAVVIS, Inc.; U.S. Telepacific Corp. d/b/a Telepacific Communications	
BT Americas Inc.	BT
COMPTEL	COMPTEL
Computer Technology Industry Association	CompTIA
Covad Communications Group; NuVox Communications; XO Communications, LLC	Covad *et al.*
Embarq	Embarq
Global Crossing North America, Inc.	Global Crossing
Iowa Telecommunications Services, Inc.	Iowa Telecom
Independent Telephone and Telecommunications Alliance	ITTA
New Jersey Division of Rate Counsel	NJ DRC
Office of Advocacy, U.S. Small Business Administration	SBA
PAETEC Communications, Inc.	PAETEC
Qwest Communications International Inc.	Qwest
Sprint Nextel Corporation	Sprint
The Free State Foundation	Free State Foundation
Time Warner Telecom, Inc. & One Communications Corp.	tw telecom / One Communications
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon

2007 Refresh the Record Reply Commenters

Commenter	Abbreviation
360 Networks (USA), Inc.; ATX Communications, Inc.; Bridgecom International, Inc.; Broadview Networks, Inc.; Cavalier Telephone, LLC; Deltacom, Inc.; Integra Telecom, Inc.; Lightyear, Inc.; McLeod USA Telecommunications Services, Inc., RCN Telecom Services, Inc.; SAVVIS, Inc.; U.S. Telepacific Corp. d/b/a Telepacific Communications	360 Networks *et al.*
AT&T Inc.	AT&T
BT Americas Inc.	BT
Cincinnati Bell	Cincinnati Bell
Clearwire	Clearwire
COMPTEL	COMPTEL
Embarq	Embarq
Global Crossing North America, Inc.	Global Crossing

Commenter	Abbreviation
Mobile Satellite Ventures Subsidiary LLC	MSV
National Association of State Utility Consumer Advocates	NASUCA
New Jersey Division of Rate Counsel	NJ DRC
PAETEC Communications, Inc.	PAETEC
PCIA – The Wireless Infrastructure Association	PCIA
Qwest Communications International Inc.	Qwest
Sprint Nextel Corporation	Sprint
Technology and Democracy Project/Discovery Institute (Hance Haney, Senior Fellow)	Hance Haney
T-Mobile USA, Inc.	T-Mobile
United States Telecom Association	USTA
Verizon	Verizon
XO Communications, LLC; Covad Communications Group; NuVox Communications	XO *et al.*

2009 Analytical Framework Public Notice Commenters

Commenter	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
AT&T Inc.	AT&T
BT Americas Inc.	BT
Competitive Enterprise Institute	CEI
COMPTEL	COMPTEL
Global Crossing North America, Inc.	Global Crossing
Massachusetts Department of Telecommunications and Cable	MA DTC
NoChokePoints Coalition	NoChokePoints
PAETEC Holdings Inc., TDS Metrocom LLC, U.S. Telepacific Corp. and Mpower Communications Corp., d/b/a Telepacific Communications; Masergy Communications, Inc.; New Edge Network, Inc.	PAETEC *et al.*
Qwest Communications International Inc.	Qwest
Sprint Nextel Corporation	Sprint
Technology and Democracy Project / Discovery Institute (Hance Haney)	Hance Haney
Time Warner Telecom	tw telecom
Verizon and Verizon Wireless	Verizon
XO Communications, Inc.	XO

2009 Analytical Framework Public Notice Reply Commenters

Commenter	Abbreviation
Ad Hoc Telecommunications Users Committee	Ad Hoc
AT&T Inc.	AT&T
BT Americas Inc.	BT
CenturyLink	CenturyLink
COMPTEL	COMPTEL
Hawaiian Telecom, Inc. & Hawaiian Telecom Services Company, Inc.	HT / HTSC
Laurence Brett Glass, d/b/a LARIAT	LARIAT
Level 3 Communications	Level 3
Media Action Grassroots Network	MAG-Net
New Jersey Division of Rate Counsel	NJ DRC
NoChokePoints Coalition	NoChokePoints
PAETEC Holdings Inc., TDS Metrocom LLC, U.S. Telepacific Corp. and Mpower Communications Corp., d/b/a Telepacific Communications; Masergy Communications, Inc.; New Edge Network, Inc.	PAETEC *et al.*
Public Knowledge	Public Knowledge
Qwest Communications International Inc.	Qwest
Rural Cellular Association	RCA
Sprint Nextel Corporation	Sprint
The Free State Foundation	Free State Foundation
T-Mobile USA, Inc.	T-Mobile
TW Telecom, Inc.	tw telecom
United States Telecom Association	USTA
Verizon and Verizon Wireless	Verizon
XO Communications, Inc.	XO

Facilities Data Request Respondents

Commenter	Abbreviation
360 Networks	360 Networks
AT&T Inc.	AT&T
BT Americas Inc.	BT
BTI	BTI
Cbeyond Communications, LLC	CBeyond
CenturyLink	CenturyLink
Comcast	Comcast
Cox Communications, Inc.	Cox
DeltaCom, Inc.	DeltaCom
Frontier Communications	Frontier
Insight Communications, Inc.	Insight

Commenter	Abbreviation
Integra Telecom, Inc.	Integra
Level 3 Communications, LLC	Level 3
MegaPath, Inc. and Covad Communications Company	Megapath / Covad
New Edge Network, Inc.	New Edge Network
One Communications Corporation	One Communications
Qwest	Qwest
RCN Telecom Services, LLC	RCN
Sprint Nextel Corp.	Sprint
TDS Metrocom, LLC	TDS Metrocom
Time Warner Cable	Time Warner Cable
T-Mobile USA	T-Mobile
TW Telecom, Inc.	tw telecom
U.S. TelePacific Corp	TelePacific
United States Cellular Corporation	US Cellular
Verizon	Verizon

Competition Data Request Respondents

Commenter	Abbreviation
AT&T Services, Inc.	AT&T
British Telecom	BT
Cbeyond Communications, LLC	CBeyond
California Association of Competitive Telecommunications Companies	CALTEC
CenturyLink	CenturyLink
Fairpoint	Fairpoint
Frontier Communications	Frontier
Level 3 Communications, LLC	Level 3
RCN	RCN
Sprint Nextel Corporation	Sprint
TW Telecom, Inc.	tw telecom
Verizon	Verizon
XO Communications, Inc.	XO

APPENDIX D

PRICING FLEXIBILITY GRANTS FOR CHANNEL TERMINATIONS TO END USERS

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Asheville NC	AT&T	Bell South	I	Yes		76%	11%	1	9	2000	1	1
Atlanta GA	AT&T	Bell South	II	Yes		88%	28%	16	58	2000	1	1
Augusta GA	AT&T	Bell South	I	Yes		73%	23%	3	13	2000	1	1
Baton Rouge LA	AT&T	Bell South	II	Yes		91%	38%	6	16	2000	1	1
Biloxi-Gulfport MS	AT&T	Bell South	II	Yes		85%	27%	3	11	2000	1	1
Birmingham AL	AT&T	Bell South	I	Yes		81%	21%	7	33	2000	1	1
Charlotte-Gastonia NC	AT&T	Bell South	II	Yes		96%	55%	12	22	2000	1	1
Chattanooga TN-GA	AT&T	Bell South	II	Yes		87%	23%	3	13	2000	1	1
Columbus GA-AL	AT&T	Bell South	I	Yes		80%	14%	1	7	2000	1	1
Daytona Beach FL	AT&T	Bell South	II	Yes		94%	31%	4	13	2000	1	1
Gainesville FL	AT&T	Bell South	II	Yes		93%	17%	1	6	2000	1	1
Greensboro-Winston Salem-High Point NC	AT&T	Bell South	II	Yes		91%	39%	7	18	2000	1	1
Greenville-Spartanburg SC	AT&T	Bell South	I	Yes		78%	21%	5	24	2000	1	1

[1] For purposes of this chart, the term "MSA" is defined in accordance with our pricing flexibility rules. *See* 47 C.F.R. § 22.909(a).

[2] "PF Type" means type of pricing flexibility, *i.e.*, Phase I or Phase II.

[3] This column indicates whether an incumbent LEC made a competitive showing through the collocation rule or through the alternative revenue-based trigger, or both.

[4] "Pet." is an abbreviation for petition, and refers to an incumbent LEC's petition for pricing flexibility. *See infra* App. E.

[5] *See infra* App. F.

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Huntsville AL	AT&T	Bell South	I	Yes		66%	31%	4	13	2000	1	1
Jackson MS	AT&T	Bell South	II	Yes		86%	22%	4	18	2000	1	1
Jacksonville FL	AT&T	Bell South	II	Yes		93%	38%	13	34	2000	1	1
Knoxville TN	AT&T	Bell South	II	Yes		94%	43%	6	14	2000	1	1
Lake Charles LA	AT&T	Bell South	II	Yes		92%	50%	3	6	2000	1	1
Louisville KY-IN	AT&T	Bell South	II	Yes		86%	44%	8	18	2000	1	1
Melbourne-Titusville-Palm Bay FL	AT&T	Bell South	II	Yes		87%	44%	4	9	2000	1	1
Memphis TN-AR-MS	AT&T	Bell South	II	Yes		97%	61%	11	18	2000	1	1
Miami-Ft. Lauderdale-Hollywood FL	AT&T	Bell South	II	Yes	Yes	93%	75%	38	51	2000	1	1
Mobile AL	AT&T	Bell South	I	Yes		76%	25%	4	16	2000	1	1
Monroe LA	AT&T	Bell South	II	Yes		97%	40%	2	5	2000	1	1
Montgomery AL	AT&T	Bell South	II	Yes		95%	43%	3	7	2000	1	1
Nashville Davidson TN	AT&T	Bell South	II	Yes		94%	39%	16	41	2000	1	1
New Orleans LA	AT&T	Bell South	I	Yes		74%	21%	6	28	2000	1	1
Orlando FL	AT&T	Bell South	II	Yes	Yes	100%	70%	7	10	2000	1	1
Panama City FL	AT&T	Bell South	I	Yes		78%	20%	1	5	2000	1	1
Pensacola FL	AT&T	Bell South	II	Yes		91%	25%	3	12	2000	1	1
Raleigh-Durham NC	AT&T	Bell South	II	Yes		94%	53%	8	15	2000	1	1
Savannah GA	AT&T	Bell South	II	Yes		94%	38%	3	8	2000	1	1
Shreveport LA	AT&T	Bell South	II	Yes		88%	33%	5	15	2000	1	1
West Palm Beach-Boca Raton FL	AT&T	Bell South	II	Yes		89%	63%	10	16	2000	1	1
Wilmington NC	AT&T	Bell South	II	Yes		91%	25%	2	8	2000	1	1
Champaign-Urbana IL	AT&T	Ameritech	II		Yes		67%	2	3	2001	2	2
Evansville-Henderson IN-KY	AT&T	Ameritech	I	Yes		67%	8%	1	13	2001	2	2
Kalamazoo MI	AT&T	Ameritech	I	Yes		76%	13%	1	8	2001	2	2

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Springfield IL	AT&T	Ameritech	II	Yes		95%	18%	2	11	2001	2	2
Toledo OH	AT&T	Ameritech	I	Yes		71%	47%	7	15	2001	2	2
Sacramento CA	AT&T	Pac Bell	I	Yes		77%	23%	8	35	2001	3	2
San Diego CA	AT&T	Pac Bell	I	Yes		67%	25%	13	51	2001	3	2
Austin-San Marcos TX	AT&T	SWBT	I	Yes		77%	25%	6	24	2001	4	2
Dallas-Fort Worth TX	AT&T	SWBT	I	Yes		74%	21%	18	86	2001	4	2
Houston TX	AT&T	SWBT	I	Yes		74%	30%	21	70	2001	4	2
Kansas City MO-KS	AT&T	SWBT	I	Yes		66%	21%	7	33	2001	4	2
Lubbock TX	AT&T	SWBT	II		Yes		67%	4	6	2001	4	2
Oklahoma City OK	AT&T	SWBT	I	Yes		70%	22%	7	32	2001	4	2
San Antonio TX	AT&T	SWBT	I	Yes		76%	26%	8	31	2001	4	2
Springfield MO	AT&T	SWBT	II	Yes		97%	17%	2	12	2001	4	2
Tulsa OK	AT&T	SWBT	I	Yes		83%	19%	5	26	2001	4	2
Altoona PA	Verizon	Verizon	I	Yes	Yes	76%	50%	1	2	2001	5	3
Baltimore, MD	Verizon	Verizon	I	Yes		74%	45%	21	47	2001	5	3
Charleston WV	Frontier	Verizon	II	Yes	Yes	100%	100%	5	5	2001	5	3
Hagerstown, MD	Verizon	Verizon	II	Yes	Yes	100%	100%	1	1	2001	5	3
Lynchburg VA	Verizon	Verizon	I	Yes		75%	29%	2	7	2001	5	3
Manchester NH	Frontier	Verizon	I	Yes		81%	15%	2	13	2001	5	3
No MSA Delaware	Verizon	Verizon	II	Yes	Yes	100%	100%	9	9	2001	5	3
Norfolk-Virginia Beach-Portsmouth VA-NC	Verizon	Verizon	II	Yes	Yes	92%	83%	15	18	2001	5	3
Parkersburg-Marietta, OH-WV	Frontier	Verizon	II	Yes	Yes	100%	100%	1	1	2001	5	3
Philadelphia, PA	Verizon	Verizon	I	Yes		79%	42%	46	110	2001	5	3
Portland, ME	Fairpoint	Verizon	I	Yes		67%	14%	3	22	2001	5	3
Reading PA	Verizon	Verizon	II	Yes	Yes	96%	80%	4	5	2001	5	3

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Richmond VA	Verizon	Verizon	II	Yes	Yes	91%	65%	15	23	2001	5	3
Roanoke VA	Verizon	Verizon	II	Yes		91%	60%	3	5	2001	5	3
Vineland-Millville-Bridgeton NJ	Verizon	Verizon	II	Yes	Yes	100%	75%	3	4	2001	5	3
Washington DC-MD-VA-WV	Verizon	Verizon	I	Yes		66%	26%	25	95	2001	5	3
Williamsport PA	Verizon	Verizon	II	Yes		87%	50%	1	2	2001	5	3
Wilmington, DE-NJ-MD	Verizon	Verizon	II	Yes	Yes	100%	80%	12	15	2001	5	3
Sarasota, FL	Verizon	Verizon	I	Yes		66%	27%	3	11	2001	6	3
Rochester NY	Frontier	Frontier	I	Yes		77%	27%	15	56	2001	7	4
Fayetteville NC	CenturyLink	Sprint	II	Yes		85%	60%	3	5	2002	8	5
Harrisburg PA	CenturyLink	Sprint	I	Yes		79%	7%	1	14	2002	8	5
Ocala FL	CenturyLink	Sprint	I	Yes		67%	10%	1	10	2002	8	5
Pittsburgh PA	CenturyLink	Sprint	I	Yes		66%	7%	1	14	2002	8	5
York PA	CenturyLink	Sprint	II	Yes	Yes	100%	100%	1	1	2002	8	5
Akron, OH	Frontier	Verizon	II	Yes		93%	50%	1	2	2002	9	6
Albany-Schenectady-Troy, NY	Verizon	Verizon	I	Yes		82%	28%	12	43	2002	9	6
Allentown-Bethlehem-Easton, PA-NJ	Verizon	Verizon	I	Yes		72%	36%	4	11	2002	9	6
Binghamton, NY	Verizon	Verizon	II	Yes		87%	38%	3	8	2002	9	6
Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH	Verizon	Verizon	I	Yes		76%	34%	48	142	2002	9	6
Bridgeport-Stamford-Norwalk-Danbury, CT	Verizon	Verizon	II	Yes		99%	50%	1	2	2002	9	6
Buffalo, NY	Verizon	Verizon	I	Yes		80%	35%	14	40	2002	9	6
Fort Wayne, IN	Frontier	Verizon	II	Yes		88%	31%	8	26	2002	9	6
Harrisburg, PA	Verizon	Verizon	II	Yes		87%	58%	7	12	2002	9	6
Huntington-Ashland, WV/KY/OH	Frontier	Verizon	II	Yes	Yes	100%	100%	2	2	2002	9	6

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Lakeland-Winter Haven, FL	Verizon	Verizon	I	Yes		66%	23%	5	22	2002	9	6
Lancaster, PA	Verizon	Verizon	II	Yes	Yes	97%	67%	2	3	2002	9	6
New York, NY-NJ/Nassau-Suffolk, NY/Newark, Jersey City and Paterson-Clifton-Passaic, NJ	Verizon	Verizon	I	Yes		76%	38%	90	239	2002	9	6
No MSA Idaho	Frontier	Verizon	I	Yes		65%	12%	3	26	2002	9	6
Northeast Pennsylvania, PA	Verizon	Verizon	II	Yes		87%	47%	8	17	2002	9	6
Pittsburgh, PA	Verizon	Verizon	II	Yes		89%	47%	34	73	2002	9	6
Portland, OR-WA	Frontier	Verizon	I	Yes		83%	32%	7	22	2002	9	6
Providence-Warwick-Pawtucket, RI	Verizon	Verizon	I	Yes	Yes	79%	50%	11	22	2002	9	6
Raleigh-Durham, NC	Frontier	Verizon	I	Yes		74%	42%	5	12	2002	9	6
San Francisco-Oakland, CA	Verizon	Verizon	II	Yes	Yes	100%	100%	1	1	2002	9	6
Seattle-Everett, WA	Frontier	Verizon	I	Yes		68%	18%	5	28	2002	9	6
Sharon, PA	Verizon	Verizon	II	Yes	Yes	100%	100%	1	1	2002	9	6
Springfield-Chicopee-Holyoke, MA	Verizon	Verizon	I	Yes		78%	29%	9	31	2002	9	6
State College, PA	Verizon	Verizon	II	Yes		85%	50%	1	2	2002	9	6
Syracuse, NY	Verizon	Verizon	I	Yes		80%	23%	8	35	2002	9	6
Worchester-Fitchburg-Leominster, MA	Verizon	Verizon	I	Yes		84%	48%	21	44	2002	9	6
Chicago IL	AT&T	Ameritech	I	Yes		83%	42%	58	139	2002	10	7
Cleveland OH	AT&T	Ameritech	I	Yes		74%	35%	14	40	2002	10	7
Decatur IL	AT&T	Ameritech	II	Yes	Yes	100%	67%	2	3	2002	10	7
Detroit-Ann Arbor MI	AT&T	Ameritech	I	Yes		71%	27%	26	97	2002	10	7
Flint MI	AT&T	Ameritech	II	Yes	Yes	100%	90%	9	10	2002	10	7
Grand Rapids MI	AT&T	Ameritech	II	Yes		96%	57%	16	28	2002	10	7
Indianapolis IN	AT&T	Ameritech	I	Yes		79%	24%	8	33	2002	10	7

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Madison WI	AT&T	Ameritech	II	Yes	Yes	98%	86%	6	7	2002	10	7
Milwaukee WI	AT&T	Ameritech	II	Yes		88%	53%	18	34	2002	10	7
Rockford IL	AT&T	Ameritech	II	Yes	Yes	100%	100%	3	3	2002	10	7
San Francisco/Oakland CA	AT&T	Pac Bell	I	Yes		80%	31%	23	75	2002	11	7
San Jose CA	AT&T	Pac Bell	II	Yes		92%	58%	11	19	2002	11	7
Amarillo TX	AT&T	SWBT	II	Yes		93%	50%	3	6	2002	12	7
St. Louis MO-IL	AT&T	SWBT	I	Yes		80%	31%	15	49	2002	12	7
Albuquerque, NM	CenturyLink	Qwest	II	Yes		88%	50%	7	14	2002	13	8
Bellingham, WA	CenturyLink	Qwest	II	Yes		100%	50%	1	2	2002	13	8
Boise City, ID	CenturyLink	Qwest	II	Yes		91%	25%	2	8	2002	13	8
Colorado Springs, CO	CenturyLink	Qwest	II	Yes		93%	25%	4	16	2002	13	8
Davenport-Rock Island-Moline, IA/IL	CenturyLink	Qwest	II	Yes	Yes	97%	67%	4	6	2002	13	8
Denver-Boulder CO	CenturyLink	Qwest	I	Yes		77%	35%	17	48	2002	13	8
Des Moines, IA	CenturyLink	Qwest	II	Yes		87%	21%	4	19	2002	13	8
Dubuque, IA	CenturyLink	Qwest	II	Yes		99%	50%	1	2	2002	13	8
Eugene-Springfield, OR	CenturyLink	Qwest	II	Yes		86%	15%	2	13	2002	13	8
Fargo-Moorehead, ND-MN	CenturyLink	Qwest	II	Yes		99%	25%	2	8	2002	13	8
Fort Collins-Loveland CO	CenturyLink	Qwest	I	Yes		68%	40%	2	5	2002	13	8
Iowa City, IA	CenturyLink	Qwest	II	Yes	Yes	100%	100%	1	1	2002	13	8
Medford, OR	CenturyLink	Qwest	II	Yes		87%	14%	1	7	2002	13	8
Minneapolis-St. Paul MN-WI	CenturyLink	Qwest	I	Yes		81%	37%	20	54	2002	13	8
Olympia, WA	CenturyLink	Qwest	II	Yes	Yes	99%	67%	2	3	2002	13	8
Omaha, NB-IA	CenturyLink	Qwest	II	Yes		94%	52%	11	21	2002	13	8
Phoenix, AZ	CenturyLink	Qwest	II	Yes		88%	40%	19	48	2002	13	8
Portland, OR-WA	CenturyLink	Qwest	II	Yes		91%	56%	10	18	2002	13	8

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Provo-Orem UT	CenturyLink	Qwest	I	Yes		81%	20%	2	10	2002	13	8
Pueblo CO	CenturyLink	Qwest	I	Yes		70%	20%	1	5	2002	13	8
Rochester, MN	CenturyLink	Qwest	II	Yes		99%	50%	1	2	2002	13	8
Salem OR	CenturyLink	Qwest	I	Yes		78%	14%	1	7	2002	13	8
Salt Lake City-Ogden, UT	CenturyLink	Qwest	II	Yes		88%	34%	10	29	2002	13	8
Seattle-Everett WA	CenturyLink	Qwest	I	Yes		79%	44%	12	27	2002	13	8
Sioux City IA-NE	CenturyLink	Qwest	I	Yes		80%	13%	1	8	2002	13	8
Spokane, WA	CenturyLink	Qwest	II	Yes		96%	50%	6	12	2002	13	8
St. Cloud, MN	CenturyLink	Qwest	II	Yes		92%	13%	1	8	2002	13	8
Tacoma, WA	CenturyLink	Qwest	I	Yes		72%	29%	4	14	2002	13	8
Tucson, AZ	CenturyLink	Qwest	I	Yes		75%	24%	5	21	2002	13	8
Waterloo-Cedar Falls, IA	CenturyLink	Qwest	I	Yes		71%	17%	1	6	2002	13	8
Yakima WA	CenturyLink	Qwest	II	Yes		92%	50%	1	2	2002	13	8
Burlington NC	AT&T	Bell South	I	Yes		65%	20%	1	5	2002	14	9
Clarksville-Hopkinsville TN/KY	AT&T	Bell South	I	Yes		75%	17%	2	12	2002	14	9
Columbia SC	AT&T	Bell South	II	Yes		87%	38%	5	13	2002	14	9
Evansville IN-KY	AT&T	Bell South	II	Yes		94%	25%	1	4	2002	14	9
Lafayette LA	AT&T	Bell South	II	Yes		89%	29%	2	7	2002	14	9
Owensboro KY	AT&T	Bell South	II	Yes		99%	11%	1	9	2002	14	9
Bangor, ME	Fairpoint	Verizon	I	Yes		84%	7%	1	14	2003	15	10
Bloomington-Normal, IL	Frontier	Verizon	II	Yes		94%	15%	3	20	2003	15	10
Erie, PA	Verizon	Verizon	II	Yes		89%	33%	5	15	2003	15	10
No MSA West Virginia	Frontier	Verizon	I	Yes		75%	8%	8	97	2003	15	10
Tampa-St. Petersburg, FL	Verizon	Verizon	I	Yes		83%	48%	24	50	2003	15	10
Columbus OH	AT&T	Ameritech	II	Yes		88%	47%	14	30	2003	16	11
Eau Claire WI	AT&T	Ameritech	I	Yes	Yes	77%	50%	1	2	2003	16	11

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Janesville WI	AT&T	Ameritech	II	Yes	Yes	98%	67%	2	3	2003	16	11
Kenosha WI	AT&T	Ameritech	I	Yes		70%	40%	2	5	2003	16	11
Lansing-East Lansing MI	AT&T	Ameritech	II	Yes		89%	25%	6	24	2003	16	11
Racine WI	AT&T	Ameritech	II	Yes		88%	50%	3	6	2003	16	11
Sheboygan WI	AT&T	Ameritech	II	Yes		90%	50%	1	2	2003	16	11
Fresno CA	AT&T	Pac Bell	II	Yes		89%	24%	5	21	2003	17	11
Los Angeles-Long Beach CA	AT&T	Pac Bell	II	Yes		85%	55%	64	116	2003	17	11
Oxnard-Simi Valley-Ventura CA	AT&T	Pac Bell	I	Yes		72%	22%	2	9	2003	17	11
Santa Rosa-Petaluma CA	AT&T	Pac Bell	I	Yes		83%	22%	4	18	2003	17	11
Stockton CA	AT&T	Pac Bell	I	Yes		77%	33%	3	9	2003	17	11
Fort Smith AR-OK	AT&T	SWBT	I	Yes		68%	18%	2	11	2003	18	11
Little Rock-North Little Rock AR	AT&T	SWBT	II	Yes		90%	38%	9	24	2003	18	11
Topeka KS	AT&T	SWBT	II	Yes		91%	29%	2	7	2003	18	11
Reno NV	AT&T	Nevada Bell	I	Yes		83%	29%	4	14	2003	19	11
Elkhart-Goshen, IN	Frontier	Verizon	I	Yes		71%	29%	2	7	2004	20	12
Anderson IN	AT&T	Ameritech	I	Yes		79%	20%	1	5	2004	21	13
Appleton-Oshkosh-Neenah WI	AT&T	Ameritech	II	Yes		91%	33%	3	9	2004	21	13
Battle Creek MI	AT&T	Ameritech	I	Yes		71%	25%	2	8	2004	21	13
Bloomington IN	AT&T	Ameritech	II	Yes		100%	50%	1	2	2004	21	13
Green Bay WI	AT&T	Ameritech	II	Yes		96%	57%	4	7	2004	21	13
Muncie IN	AT&T	Ameritech	II	Yes		94%	20%	1	5	2004	21	13
South Bend-Mishawaka IN	AT&T	Ameritech	II	Yes		96%	57%	4	7	2004	21	13
Bridgeport-Stamford-Norwalk-Danbury CT	AT&T	SNET	I	Yes		80%	41%	9	22	2004	22	13
Hartford et al., CT	AT&T	SNET	II	Yes		92%	25%	11	44	2004	22	13
Abilene TX	AT&T	SWBT	II	Yes		98%	40%	2	5	2004	23	13

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Joplin MO	AT&T	SWBT	I	Yes		78%	17%	1	6	2004	23	13
Longview-Marshall TX	AT&T	SWBT	II	Yes		89%	40%	2	5	2004	23	13
St. Joseph MO	AT&T	SWBT	II	Yes		92%	20%	1	5	2004	23	13
Waco TX	AT&T	SWBT	I	Yes		66%	7%	1	14	2004	23	13
Wichita Falls TX	AT&T	SWBT	I	Yes		82%	29%	2	7	2004	23	13
Dallas-Forth Worth, TX	Verizon	Verizon	II	Yes	Yes	93%	81%	29	36	2005	24	14
New Haven, et al., CT	AT&T	SNET	I	Yes		79%	31%	8	26	2005	25	15
Corpus Christi TX	AT&T	SWBT	II	Yes		85%	33%	3	9	2005	26	15
Lawton OK	AT&T	SWBT	II	Yes		88%	25%	1	4	2005	26	15
Memphis TN-AR-MS	AT&T	SWBT	I	Yes		79%	20%	1	5	2005	26	15
Midland TX	AT&T	SWBT	II	Yes	Yes	91%	67%	2	3	2005	26	15
Wichita KS	AT&T	SWBT	I	Yes		83%	19%	5	26	2005	26	15
Dallas TX	CenturyLink	Sprint	I	Yes		67%	24%	4	17	2006	27	16
Cincinnati OH-KY-IN	AT&T	Ameritech	I	Yes	Yes	68%	50%	1	2	2006	28	17
Hamilton-Middletown, OH	AT&T	Ameritech	II	Yes	Yes	97%	67%	2	3	2006	28	17
Jackson MI	AT&T	Ameritech	II	Yes		89%	17%	1	6	2006	28	17
Louisville KY-IN	AT&T	Ameritech	II	Yes		91%	50%	3	6	2006	28	17
Saginaw-Bay City-Midland MI	AT&T	Ameritech	II	Yes		87%	38%	6	16	2006	28	17
Fayetteville-Springdale AR	AT&T	SWBT	II	Yes		97%	44%	4	9	2006	29	17
Kokomo IN	AT&T	Ameritech	II	Yes		98%	50%	2	4	2007	30	18
Lima OH	CenturyLink	Embarq	II	Yes		87%	6%	1	16	2007	31	19
Cincinnati OH-KY-IN	Cincinnati Bell	Cincinnati Bell	I	Yes		69%	21%	9	42	2008	32	20
Albany GA	AT&T	Bell South	II	Yes		99%	33%	1	3	2008	33	21
Alexandria LA	AT&T	Bell South	I	Yes		79%	10%	1	10	2008	33	21
Anderson SC	AT&T	Bell South	II	Yes		87%	20%	1	5	2008	33	21

MSA[1]	Carrier Name		PF Type[2]	Type of Rule Used to Make Competitive Showing [3]		Competitive Showing Metrics		Number of Wire Centers in MSA		Year Granted	Source	
	Current	At Time of Grant	Phase I or II	Rev	Collo	% Rev	% Wire Ctrs	With Collo	Total		Pet.[4]	Order[5]
Athens GA	AT&T	Bell South	II	Yes	Yes	97%	67%	2	3	2008	33	21
Charleston-North Charleston SC	AT&T	Bell South	II	Yes		87%	50%	7	14	2008	33	21
Florence SC	AT&T	Bell South	II	Yes		98%	50%	1	2	2008	33	21
Lexington KY	Windstream	Windstream	I	Yes		65%	38%	5	13	2008	34	22
Anchorage AK	ACS	ACS	II	Yes		96%	64%	7	11	2010	35	23
Fairbanks AK	ACS	ACS	II	Yes	Yes	100%	100%	1	1	2010	35	23
Non-MSA Juneau AK	ACS	ACS	II	Yes		99%	50%	2	4	2010	35	23

APPENDIX E

PETITIONS FOR PRICING FLEXIBILITY

1. *Petition of BellSouth Telecommunications, Inc. (BellSouth) for Pricing Flexibility Under Section 69.727 of the Commission's rules for the Specific MSAs*, Petition for Pricing Flexibility and attachments, attach. 3 (filed Aug. 24, 2000).
2. *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Nov. 17, 2000).
3. *Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the San Jose, San Francisco, Sacramento, Los Angeles/Long Beach, Orange County, Oakland and San Diego CA MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Nov. 17, 2000).
4. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Austin/San Marcos TX, Amarillo TX, El Paso TX, Dallas/Ft. Worth TX, Corpus Christi TX, Houston TX, Lubbock TX, San Antonio TX, Kansas City MO-KS, St. Louis MO, Springfield MO, Little Rock AR, Oklahoma City OK, Tulsa OK and Topeka KS MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Nov. 17, 2000).
5. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Nov. 17, 2000).
6. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Dec. 18, 2000).
7. *Access Charge Reform*, *Price Cap Performance Review for Local Exchange Carriers*, *Interexchange Carrier Purchases of Switches Access Services Offered by Competitive Local Exchange Carriers*, *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Petition for Pricing Flexibility and attachments, attach. 3 (filed Mar. 20, 2001).
8. *Sprint Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Nov. 16, 2001).
9. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Nov. 29, 2001).
10. *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Dec. 19, 2001); Letter from Davida M. Grant, Senior Counsel for Ameritech Operating Companies, *et al.*, to Magalie R. Salas, Secretary, FCC, with appendix, app. C (filed Jan. 18, 2002); Letter from Davida M. Grant, Senior Counsel for Ameritech Operating Companies, *et al.*, to William Canton, Acting Secretary, FCC, with appendix, app. C (filed Mar. 22, 2002).
11. *Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the San Jose, Los Angeles/Long Beach, and San*

Francisco/Oakland, CA MSAs, Petition for Pricing Flexibility and appendices, app. C (filed Dec. 19. 2001).

12. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Amarillo TX, and St. Louis MO MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Dec. 19, 2001).

13. *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. F (filed Dec. 31, 2001); Letter from Craig J. Brown, Senior Attorney for Qwest, to Magalie R. Salas, Secretary, FCC (filed Jan. 4, 2002).

14. *Petition of BellSouth Telecommunications, Inc. for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules*, Petition for Pricing Flexibility and attachments, attach. 3 (filed Aug. 2, 2002).

15. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Dec. 13, 2002).

16. *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 30, 2003).

17. *In the Matter of Petition of Pacific Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Bakersfield, Fresno, Los Angeles-Long Beach, et al., Oxnard-Simi Valley-Ventura, Santa Rosa-Petaluma, and Stockton, CA MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 30, 2003).

18. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Joplin MO, St. KS, Wichita KS, Beaumont-Port Arthur TX, and Midland TX MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 30, 2003).

19. *Petition of Nevada Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Reno, NV MSA*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 30, 2003).

20. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Jan. 16, 2004).

21. *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Feb. 13, 2004).

22. *Petition of Southern New England Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Hartford, et al., CT and Bridgeport, et al., CT MSA*, Petition for Pricing Flexibility and appendices, app. C (filed Feb 13, 2004).

23. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Joplin MO, St. Joseph MO, Abilene TX, Brownsville-*

Harlingen TX, Longview-Marshall TX, Waco TX, and Wichita Falls TX MSAs, Petition for Pricing Flexibility and appendices, app. C (filed Feb 13, 2004).

24. *Verizon Petition for Pricing Flexibility for Special Access Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Jan. 28, 2005).

25. *Petition of Southern New England Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the New Haven, et al., CT and New London-Norwich, CT MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Feb. 18, 2005).

26. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Corpus Christi TX, McAllen-Edinburg-Mission TX, Memphis, TN-AR-MS, Midland TX, Lawton OK, Tyler TX, and Wichita KS MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Feb. 18, 2005).

27. *Sprint Local Telephone Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Petition for Pricing Flexibility and attachments, attach. D (filed Dec. 7, 2005).

28. *Petition of Illinois Bell Telephone Company (Ameritech Illinois), Indiana Bell Telephone Company, Incorporated (Ameritech Indiana), Michigan Bell Telephone Company (Ameritech Michigan), The Ohio Bell Telephone Company (Ameritech Ohio), and Wisconsin Bell, Inc. (Ameritech Wisconsin) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSA and Non-MSA, WI*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 19, 2006).

29. *Petition of Southwestern Bell Telephone Company for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Fayetteville-Springdale, AR MSA, Non-MSA, KS and Non-MSA, MO*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 19, 2006).

30. *Petition of Indiana Bell Telephone Company, Incorporated (Ameritech Indiana) and The Ohio Bell Telephone Company (Ameritech Ohio) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 12, 2007).

31. *Petition of Embarq Local Operating Companies (Embarq) for Phase I and Phase II Pricing Flexibility for Special Access and Dedicated Transport Services in the Lima, Ohio and Mansfield, Ohio Metropolitan Statistical Areas and Phase I and Phase II Pricing Flexibility for Channel Termination Services in the Lima, Ohio Metropolitan Statistical Area*, Petition for Pricing Flexibility and attachments, attach. D (filed Apr. 30, 2007).

32. *Petition of Cincinnati Bell Telephone Company LLC (CBT) for Phase I Pricing Flexibility for Special Access, Dedicated Transport Services and End-User Channel Terminations, and Phase II Pricing Flexibility for POP Channel Termination in the Cincinnati, Ohio-Kentucky-Indiana Metropolitan Statistical Area, and Phase I Pricing Flexibility for Special Access Dedicated Transport Services and POP Channel Terminations in the Hamilton – Middletown, Ohio Metropolitan Statistical Service Area*, Petition for Pricing Flexibility and attachments, attach. D (filed Nov. 27, 2007).

33. *Petition of BellSouth Telecommunications, Inc. (BellSouth) for Pricing Flexibility Under Section 69.727 of the Commission's rules for the Specific MSAs*, Petition for Pricing Flexibility and appendices, app. C (filed Jan. 25, 2008).

34. *Petition of Windstream Kentucky East, LLC for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Lexington, Kentucky MSA and Ashland, Kentucky MSA*, Petition for Pricing Flexibility and appendices, app. C (filed June 13, 2008).

35. *ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. Petition for Phase II Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's Rules*, Petition for Pricing Flexibility and appendices, app. B (filed Jan. 29, 2010).

APPENDIX F

ORDERS GRANTING PRICING FLEXIBILITY

1. *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 00-20, Memorandum Opinion and Order, 15 FCC Rcd 24588 (Common Carrier Bur. 2000).
2. *Petition of Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility*, CCB/CPD No. 00-26, *Petition of Pacific Bell Telephone Company for Pricing Flexibility*, CCB/CPD No. 00-23 *Petition of Southwestern Bell Telephone Company for Pricing Flexibility*, CCB/CPD File No. 00-25, Memorandum Opinion and Order, 16 FCC Rcd 5889 (Common Carrier Bur. 2001).
3. *Verizon Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File Nos. 00-24, 00-28, Memorandum Opinion and Order, 16 FCC Rcd 5876 (Common Carrier Bur. 2001).
4. *Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-07, Memorandum Opinion and Order, 16 FCC Rcd 13885 (Wireline Comp. Bur. 2001).
5. *Sprint Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-022, Memorandum Opinion and Order, 17 FCC Rcd 2335 (Common Carrier Bur. 2002).
6. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27, Memorandum Opinion and Order, 17 FCC Rcd 5359 (Common Carrier Bur. 2002).
7. *Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services for Ameritech Operating Companies, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company*, CCB/CPD File Nos. 01-32, 01-33, 02-03, 01-34, 01-35, Memorandum Opinion and Order, 17 FCC Rcd 6462 (Wireline Comp. Bur. 2002).
8. *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 02-01, Memorandum Opinion and Order, 17 FCC Rcd 7363 (Wireline Comp. Bur. 2002).
9. *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 02-24, Memorandum Opinion and Order, 17 FCC Rcd 23725 (Wireline Comp. Bur. 2002).
10. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 02-33, Memorandum Opinion and Order, 18 FCC Rcd 6237 (Wireline Comp. Bur. 2003).
11. *SBC Communications Inc. Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services for Ameritech Operating Companies, Nevada Bell, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company*, WCB/Pricing File No. 03-8, Memorandum Opinion and Order, 18 FCC Rcd 10167 (Wireline Comp. Bur. 2003).
12. *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-01, Memorandum Opinion and Order, 19 FCC Rcd 8689 (Wireline Comp. Bur. 2004).

13. *Ameritech Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-09, *Nevada Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-10, *Pacific Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-11, *Southern New England Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-12, *Southwestern Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 04-13, Memorandum Opinion and Order, 19 FCC Rcd 10298 (Wireline Comp. Bur. 2004).

14. *Verizon Petition for Pricing Flexibility for Special Access Services*, WCB/Pricing File No. 05-11, Memorandum Opinion and Order, 20 FCC Rcd 9809 (Wireline Comp. Bur. 2005).

15. *Ameritech Operating Companies Petition for Pricing Flexibility for Dedicated Transport and Special Access Services*, WCB/Pricing File No. 05-14, *Southern New England Telephone Company Petition for Pricing Flexibility for Dedicated Transport and Special Access Services*, WCB/Pricing No. 05-15, *Southwestern Bell Telephone Company Petition for Pricing Flexibility for Dedicated Transport and Special Access Services*, WCB/Pricing File No. 05-16, Memorandum Opinion and Order, 20 FCC Rcd 9883 (Wireline Comp. Bur. 2005).

16. *Sprint Local Telephone Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 05-35, Order, 21 FCC Rcd 3412 (Wireline Comp. Bur. 2006).

17. *Ameritech Operating Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 06-8, *Southwestern Bell Telephone Company Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 06-9, Order, 21 FCC Rcd 5172 (Wireline Comp. Bur. 2006).

18. *Petition of Indiana Bell Telephone Company, Incorporated (Ameritech Indiana) and the Ohio Bell Telephone Company (Ameritech Ohio) for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the Specific MSAs*, WCB/Pricing File No. 07-07, Order, 22 FCC Rcd 9174 (Wireline Comp. Bur. 2007).

19. *Petition of the Embarq Local Operating Companies for Phase I and Phase II Pricing Flexibility for Special Access and Dedicated Transport Services in the Lima, Ohio and Mansfield, Ohio Metropolitan Statistical Areas and Phase I and Phase II Pricing Flexibility for Channel Termination Services in the Lima, Ohio Metropolitan Statistical Area*, WCB/Pricing File No. 07-13, Order, 22 FCC Rcd 16651 (Wireline Comp. Bur. 2007).

20. *Petition of Cincinnati Bell Telephone Company LLC (CBT) for Phase I Pricing Flexibility for Special Access, Dedicated Transport Services and End-User Channel Terminations, and Phase II Pricing Flexibility for POP Channel Terminations in the Cincinnati, Ohio-Kentucky-Indiana Metropolitan Statistical Area, and Phase I Pricing Flexibility for Special Access, Dedicated Transport Services and POP Channel Terminations in the Hamilton-Middletown, Ohio Metropolitan Statistical Area*, WCB/Pricing File No. 07-20, Order, 23 FCC Rcd 4046 (Wireline Comp. Bur. 2008).

21. *Petition of BellSouth Telecommunications, Inc. for Phase I and/or Phase II Pricing Flexibility for Dedicated Transport and Special Access Services in the Albany, GA; Athens, GA; Macon-Warner Robins, GA; Alexandria, LA; Pascagoula, MS; Anderson, SC; and Florence, SC Metropolitan Statistical Areas, and Phase I and/or Phase II Pricing Flexibility for Channel Terminations in the Albany, GA; Athens, GA, Alexandria LA; Anderson, SC; Charleston-North Charleston, SC; and*

Florence, SC Metropolitan Statistical Areas, WCB/Pricing File No. 08-02, Order, 23 FCC Rcd 7937 (Wireline Comp. Bur. 2008).

22. *Petition of Windstream Kentucky East, LLC for Pricing Flexibility as Specified in Section 69.727 of the Commission's Rules for the Lexington, Kentucky MSA and Ashland, Kentucky MSA*, WCB/Pricing File No. 08-17, Order, 23 FCC Rcd 14626 (Wireline Comp. Bur. 2008).

23. *Petition of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc., for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's Rules*, WCB/Pricing File No. 10-02, Order, 25 FCC Rcd 7128 (Wireline Comp. Bur. 2010).

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Competition is the lifeblood of our free market economy, driving private investment, innovation, and benefits to consumers. Today the Commission acts to promote competition in communications services by taking an important step in the process of modernizing policies for access to dedicated business lines, known as "special access." Based on the record and the undisputed finding that legacy regulations are not working as intended, we temporarily suspend outdated rules that not only allow incumbent carriers to raise prices in the absence of competition, but also deny them the flexibility to lower prices in the presence of competition. We do this as we determine what permanent rules would best promote a healthy competitive marketplace. Next month we will issue a comprehensive data collection enabling the Commission to conclusively resolve its special access proceeding as quickly as possible, including to remove unnecessary regulations in many areas of the country.

My colleagues' dissents struggle to explain why the Commission should ignore the record and maintain a broken system. In contrast to the responsible decision in today's Order, the dissenters' approach would abandon the Commission's fundamental commitment to competition. In their many pages, the dissenters have no answer to the harm their approach would cause consumers and businesses of all sizes that depend on competitively provided communications services.

* * *

Special access services – services that provide dedicated, high-quality data connections – are a vital input to our broadband economy. Mobile providers use these connections to link cell towers to wireline backbone networks. Banks, credit card, technology and insurance companies, and other large enterprises use special access links to communicate among their branch offices. Small businesses rely on these services for Internet access and have made clear that promoting competition in the market for special access is essential to helping them grow and create new jobs. And our nation's schools, libraries, and government institutions use special access connections every day to provide services to their constituents. Indeed, contrary to the claims of some who say special access services are no longer relevant, these services remain a $12-$18 billion market annually.

As one group of businesses, including representatives from the financial services, automotive, manufacturing, insurance, aerospace, package delivery, information technology, and transportation industries, told us, "special access services [are] the building blocks of their corporate networks."

There is widespread agreement, however, that the rules that govern these services – rules that were adopted over a decade ago based on the predictive judgment of the agency at the time – are not working as intended. These rules, while adopted in good faith, relied on predicted developments that have not occurred. As one incumbent provider has said, "the ineffectiveness of the [competitive showing rules] is one area where purchasers of special access and ILECs agree." This understanding is confirmed by the detailed analysis in today's decision, including a thorough review of all the petitions received to date, and responses to the Commission's voluntary data requests.

It's also supported by common sense: The current rules rely on competitive showings in a portion of a large area to demonstrate competition throughout the area. In practice, these rules say that because competition exists in, say, downtown, Washington D.C., small businesses 40 miles away in Leesburg, Virginia are adequately protected.

In light of the extensive record demonstrating that our existing rules do not accurately measure competition, we're obliged to take seriously the strong arguments by multiple stakeholders that these rules are allowing anti-competitive practices in some areas while maintaining unnecessary regulation in others. Thus, today's Order temporarily suspends new grants of pricing flexibility under the current rules, while laying out a path to replace those rules based on economically sound and data-driven competitive analysis.

This is a modest but important step. It *does not*, as one of my dissenting colleagues suggests, re-regulate anything. It *does* preserve the status quo while laying out a path for important pro-competition reforms.

The dissenting Commissioners insist that we lack the data to support even this modest measure, emphasizing past Commission statements where we said we need more information to complete the special access proceeding. But it's one thing to say we don't yet know enough to know what the final rules should be – a fact on which we agree – and quite another to recognize that the record raises serious doubts about the rules we have.

Indeed, today's Order has at its heart a detailed and careful review of the data: an examination of the petitions received since our current special access rules were enacted; analysis of developments in several markets since petitions were granted to free incumbents from regulation; review of Department of Justice, Government Accountability Office, and FCC investigations into the competitive environment in several other areas after the current rules were applied to give regulatory relief; and review of new deployment data from our voluntary data requests. It is by far the most thorough and up-to-date evaluation of the special access rules we've ever done. And there's no question the interim suspension we approve today is based on better and more up-to-date data than the 13-year old rules the dissenters argue so vigorously to protect from temporary interruption.

So the dissenters argue that we should ignore the data before us and maintain a broken system as we proceed with reform. But it would be inconsistent with reasoned decision-making and defy our duty as an expert agency to continue granting new pricing petitions based on a competition analysis we know is flawed.

It would be unfair to every business and every community that would suffer from the higher prices and reduced services that come with a lack of competition.

Finally, contrary to those who say updating our special access rules will somehow impede the transition to IP networks, ensuring the right policies are in place to promote competition and investment is critical to driving private sector deployment of next generation networks. Modernizing our special access rules is a vital part of the broadband competition equation, and also an important opportunity to remove unnecessary regulations in many parts of the country.

So while there is not unanimity on today's Order, I look forward to working with my colleagues to move this proceeding forward quickly in the weeks and months ahead, including through the comprehensive data request that we all agree is the next step, which I expect to circulate soon.

Thank you to the staff of the Wireline Competition Bureau for their excellent and diligent work in this proceeding.

DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Since at least February 2007, I have called upon the Commission to seek detailed and up-to-date special access market data, in part, to ensure that any potential changes to the special access rules would be transparent and legally-sustainable.[1] I have long maintained that the Commission must have granular data from *all* players in the special access market, no matter their technology or market position, on a building-by-building and cell-site-by-cell-site basis. Not only would such an approach be appropriate, it would be consistent with the prudent past practices of the federal government when examining the special access market. For instance, the Department of Justice, in close consultation with FCC staff, routinely conducted detailed data collections and analyses during its reviews of the Verizon-MCI, SBC-AT&T and AT&T-BellSouth mergers. Furthermore, the Commission has undertaken many complex data collections in reviewing various mobile wireless and media transactions. Despite this sound tradition of seeking and analyzing the most relevant and probative evidence, calls from Members of Congress, commissioners, industry and civil society for a comprehensive data collection and analysis in the course of contemplating a change in special access rules have gone unanswered for more than five years.

Today, the majority has opted to suspend a thirteen-year-old special access regulatory framework without an adequate evidentiary record or market analysis, both of which are necessary to make such a sweeping rule change. In doing so, the majority chose to lay its procedural path backwards. Due to such glaring deficiencies, I have no choice but to respectfully cast a dissenting vote.

Curiously, while adopting a substantive rule change today, only months ago the Commission admitted that the record in this proceeding was insufficient to render a substantive decision. In fact, in an attempt to remedy that ongoing deficiency, the Wireline Competition Bureau has sought data over the past three years regarding the special access marketplace by soliciting *voluntary* submissions.[2] Yet, the Commission has consistently determined that these efforts failed to harvest the evidence needed to sustain a substantive rule change, explaining as much to the U.S. Court of Appeals for the District of Columbia Circuit. Specifically, the Commission reported last fall that the pending special access rulemaking "involves intensely fact-bound issues . . . [which] cannot adequately be addressed until the Commission itself compiles an evidentiary record that is sufficient to evaluate current conditions in the special access market."[3] The Commission further stated that "[w]hile the agency has made progress toward building a sufficient evidentiary record, its efforts have been impeded by the failure of some parties to produce

[1] In fact, in response to a May 23, 2007, letter from Congressman Edward Markey, I indicated that I supported completing review of the record necessary to adopt a special access order by September 15, 2007.

[2] See Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM, 24 FCC Rcd 13638 (2009); Data Requested in Special Access NPRM, 25 FCC Rcd 15146 (2010); see also Clarification of Data Requested in Special Access NPRM, 25 FCC Rcd 17693 (2010); Competition Data Requested in Special Access NPRM, 26 FCC Rcd 14000 (2011).

[3] Opposition of the Fed. Commc'ns Comm'n to Petition for Writ of Mandamus at 1, *In re COMPTEL, et al*., No. 11-1262 (D.C. Cir. filed Oct. 6, 2011).

information clearly documenting their claims that special access rates are unreasonable."[4] The majority claims that, since the FCC filed this brief with the D.C. Circuit, additional data has been submitted into the record in this proceeding. At the same time, the majority acknowledges that the FCC needs more specific data to fully resolve this rulemaking. They cannot have it both ways.

Next, this order purports to be an "interim" change, but, as is often the case with "interim" FCC orders, the Commission neglects to reveal how long this "interim" period will last. Literally, no end is in sight. "Interim" solutions often turn into long-term changes or sometimes even effectively permanent regulations. For example, in 2008, the FCC adopted an "interim" cap on universal service funding for competitive eligible telecommunications carriers[5] with the hope that comprehensive universal service reform would be adopted within months. In reality, however, the "interim" rule change, which I supported, lasted approximately three and a half years, a length of time I never anticipated. Another example is the Commission's adoption in 1998 of the "interim" wireless interstate revenue safe harbor which is still in effect today -- and still referred to as "interim."[6]

In fact, the Commission has been considering changes to the special access rules since 2002, when AT&T filed a petition for rulemaking,[7] yet has not acted in the ensuing decade. Experience has taught us that the Commission is quite capable of measuring the frequency of its actions on special access matters in geologic time. Accordingly, my expectation that the Commission will act with alacrity now that it has implemented "interim" rule changes is low. In short, this "interim" rule change is constructively permanent yet lacks a proper evidentiary foundation. By all appearances, the majority is wrapping its decision in the protective cloak of "interim" status merely to increase its odds of success during the inevitable appeal.

Additionally, perhaps as a harbinger of future inaction, today's order does *not* include the mandatory data request many had expected. To be fair, the order indicates that the Commission will issue a data request within 60 days, however, this process should have been *completed* by now. The Commission has been working on this project for years and it offers no defensible reason as to why it needs even more time to issue a mandatory data collection. Moreover, as the order concedes, because the data collection will be subject to Office of Management and Budget approval under the Paperwork Reduction Act, final resolution of merely the initiation of the data harvest could be months away. The

[4] *Id.* at 2.

[5] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, para. 1 (2008).

[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21257, para. 11 (1998) (establishing an "interim safe harbor" percentage rate for revenue calculations of certain universal service fund contributors); *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24954, para. 1 (2002) (increasing the "interim safe harbor" percentage rate for the revenue calculations of certain wireless universal service contributors); *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7520, para. 2 (2006) (further increasing the "interim safe harbor" percentage rate for the revenue calculations of certain wireless universal service contributors).

[7] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (Filed on October 15, 2002).

federal government's glacial athleticism is on full display.

In sum, adopting a "temporary" rule suspension without an appropriate data collection and market analysis is procedurally and substantively deficient and could create tremendous market uncertainty, therefore deterring investment in critical broadband backhaul infrastructure.[8] Nevertheless, I urge the Commission to move quickly with its upcoming mandatory data collection and market analysis so that it can make fully-informed decisions as to whether and how the special access rules should be changed, all in the absence of preconceived outcomes. As a matter of good government, such reasoned resolution is long overdue.

For all of these reasons, I respectfully dissent.

[8] *See, e.g.,* Letter from Edwin D. Hill, International President, International Brotherhood of Electrical Workers, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed June 8, 2009) (new price controls on special access "would undermine investment, hurt competition and dampen incentive for telephone companies to invest further in their networks, which may slow the deployment of broadband services.").

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

While special access may not be that sexy topic everyone is tweeting about or some popular new mobile application downloaded by millions, it is indeed important to every single consumer. When they use that ATM machine, swipe their credit card at the gas pump, or access those new, fun mobile apps on their smart phone, chances are those services are being delivered because of the connections that special access provide. These connections ensure a level of quality and speed that millions of businesses rely on every day to serve consumers in many sectors of our economy.

Some argue that special access uses the technology of the past; therefore, we should not waste our time discussing it, much less fixing a system that we know is broken. Others say that, until you know what to replace your current pricing flexibility rules with, you should leave this imperfect system in place. I don't agree with either of these views. First, the evidence we have collected to date demonstrates that our pricing flexibility rules aren't working. Knowing this, it would be irresponsible and inconsistent with our obligations under one of our governing statutes, the APA, for us to continue to allow them to operate. While we don't have a permanent replacement for the pricing flexibility framework ready for implementation at this time, carriers will have the opportunity to make individual demonstrations for pricing flexibility under the widely accepted market power analysis we use for our forbearance decisions and merger analysis, just like the Department of Justice and the Federal Trade Commission do in their review of proposed mergers. Moreover, our staff is in the process of preparing a mandatory data request that we expect will result in additional and necessary information that will assist us in our reform efforts, including implementing a new, proper framework for pricing flexibility petitions.

As for the claims that there is no harm to leaving a broken system in place, the evidence in this Order demonstrates otherwise. Price cap regulation is designed to ensure that rates are just and reasonable. Flexibility from that regulation (*i.e.*, deregulation) should only occur where there are disciplinary forces of effective competition so that rates continue to be just and reasonable. This applies to both flavors of deregulation under the current pricing flexibility rules. Those that obtain Phase I flexibility (which allows carriers to offer lower rates than their tariffs on an individualized basis), have the capability to not just lower their prices, but they can do so by targeting potential competitors, further entrenching their own market positions. For those that obtain Phase II flexibility, they have the capability to unilaterally increase prices in those areas that do not have effective competition. As discussed in this Order, there is significant evidence that competition for special access services has not materialized throughout the areas granted flexibility. Given the ongoing demand for special access services and the fact that it's consumers who are ultimately paying those higher prices, I fully support the suspension of our pricing flexibility rules and our ongoing review of the prices, terms and conditions.

This agency has devoted significant resources to reform the Universal Service Fund over the last two and a half years—which is an approximately $9 billion a year system. Estimates of the special access market are anywhere between $12-18 billion annually. Given its size and importance in delivering services to consumers and the fact that this proceeding has been outstanding for seven years, I support the efforts that are being made to adopt a data collection order within 60 days and the completion of our fact finding and decision-making in this proceeding next year. I want to thank the Chairman for devoting staff

resources towards these goals and adding specificity of our timeline for completion of this proceeding in the Order, including a specific timeframe for the mandatory data request.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

Special access services are high-capacity dedicated services that many businesses and institutions rely on to meet their voice and data communications needs. In 1999, the Commission put in place a series of pricing flexibility triggers designed to serve as a proxy for competitive conditions within a geographic market. Where these proxies were met, the Commission relaxed its rules governing special access services. When proposed, this was a good and sensible system. But time and the evolution of technology has rendered these proxies increasingly ill-suited to discern between competitive and noncompetitive markets. Consider, for instance, that more than a decade later Flint, Michigan has been granted a higher level of pricing flexibility than New York City. This kind of result has led a wide variety of interests, including the Small Business Administration, Government Accountability Office, American Petroleum Institute, and wireless and wireline carriers to question their continuing validity. In short, the system put in place a decade ago both overestimates and underestimates competition. It deserves a fresh look.

Consequently, I support today's decision. But I would have preferred that the Commission concurrently issue a mandatory data request to begin the long-overdue process of collecting the information necessary to move forward with special access reform. Nonetheless, I appreciate that the agency has committed to issuing such a data request within 60 days. It is my hope that this data will lay the foundation for a new system that promotes competition, investment, and deployment of high-capacity services across the country.

DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593

In Lewis Carroll's *Alice's Adventures in Wonderland*, the Queen of Hearts impatiently exclaims: "Sentence first—verdict afterwards."[1] Unfortunately, the Commission's approach today draws more inspiration from the Queen of Hearts than the Administrative Procedure Act. First, the Commission proclaims its "sentence" by suspending our current pricing flexibility triggers. It then announces its intent to go about collecting the data necessary to reach a "verdict" on the competitiveness of the special access market and the effect of the current rules on prices. In short, the Commission has reversed the steps that a data-driven agency should take. As a result, today's action appears consistent with the Administrative Procedure Act only when viewed through the proverbial looking glass.

These procedural infirmities, however, are not the most troubling aspect of this item. Rather, it is the demise of the bipartisan deregulatory framework constructed by the Clinton Administration (and maintained by the Bush Administration) so that the Commission can travel down the rabbit hole of re-regulation. I do not expect that special access will be the only stop on this journey. Rather, today's order lays the predicate for the Commission to re-regulate fiber; a consistent regulatory philosophy demands as much.[2] Industry players will likely draw the same conclusion. As a result, the Commission's decision will chill infrastructure investment, slow the deployment of next-generation networks, and impede job creation. At a time when the private sector needs regulatory certainty and incentives to invest tens of billions of dollars in broadband infrastructure, the Commission takes action today that will have precisely the opposite effect.

We should be encouraging competition and infrastructure investment, not undermining it. We should be looking forward toward an all-IP world, not backward at legacy regulations developed during the fading era of copper. And we should ground any changes to our rules on data, not regulatory impulse. For these reasons, I respectfully dissent.

I.

For at least six years, the Commission has acknowledged that it does not have adequate data to determine how the rules on the books are affecting competition and infrastructure investment in the special access market.[3] Scattered throughout the docket are the many milestones: The Commission has asked parties to refresh the record on the special access market,[4] sought comment on the appropriate analytical framework for examining that market,[5] held a staff workshop on the analytical framework,[6]

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[1] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

[2] For example, while I do not doubt that the Commission views today's action as "critical to driving private sector deployment of next generation networks," that statement will likely give the operators of those next generation networks considerable pause about their future regulatory environment.

[3] U.S. GOV'T ACCOUNTABILITY OFFICE, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES, GAO-07-80 (2006) (GAO REPORT).

[4] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, 22 FCC Rcd 13352 (2007).

[5] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009).

requested information about the deployment of special access facilities,[7] and requested information about the prices, terms, and conditions offered in the special access market.[8]

And yet, just four months ago, the then-Chief of the Wireline Competition Bureau accurately summed up where things stand: "There is an *incredible dearth of data*. We need to be able to show that costs either do or don't relate to a market. We cannot do the analysis without the data. I understand that it would be ideal for CLECs if we could just make a finding without it. But we can't."[9]

The Commission itself said much the same thing to the U.S. Court of Appeals for the District of Columbia Circuit late last year. Despite the fact that it has been "actively engaged in the process of gathering and analyzing data that might (or might not) bear out . . . assertions about special access pricing,"[10] the Commission represented to the D.C. Circuit that it did not have the data to assess "how the pricing flexibility rules have affected the special access market."[11] Specifically, the Commission told the court that it "[l]ack[ed] sufficient data to resolve this fundamental dispute" and therefore "appropriately recognized that it should make no decisions about revising its special access rules before it has compiled and analyzed an adequate evidentiary record."[12] In other words, "[g]iven the highly fact-bound nature of the issues raised by that proceeding," any changes to our special access pricing flexibility rules must be "based on a full evidentiary record."[13]

Now, if the Commission had gathered material data in response to its September 2011 *Special Access Competition Data Public Notice*, then it might be possible to reconcile its filing in the D.C. Circuit (but not the Bureau Chief's April 2012 comments) with today's order. But it has not.[14] Indeed, the Commission today does not claim that it has the data necessary to engage in a meaningful assessment of

(Continued from previous page)

[6] *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, WC Docket No. 05-25, Public Notice, 25 FCC Rcd 8458 (2010).

[7] *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146 (2010); *see also Clarification of Data Requested in Special Access NPRM,* WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 17693 (2010).

[8] *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011) (*Special Access Competition Data Public Notice*).

[9] Ted Gotsch, *USF Contribution FNPRM Will Propose Fixes, Gillett Says*, TRDAILY, Apr. 17, 2012 (quoting then-Wireline Competition Bureau Chief Sharon Gillett) (emphasis added).

[10] *In re Comptel et al.*, Case No. 11-1262, Opposition of the FCC to Petition for Writ of Mandamus at 22 (D.C. Cir., filed Oct. 6, 2011) (General Counsel's Brief) (included as an attachment to this Statement).

[11] *Id.* at 17.

[12] *Id.* at 19.

[13] *Id.* at 15–16.

[14] In this item, the Commission cites data that it obtained through the *Special Access Competition Data Public Notice* just two times. *See* Report and Order at note 15. First, it refers to such data to note the combined special access revenues of the largest carriers in 2010. *See* Report and Order at para. 2. It next uses that data to show that carriers offers individualized contract tariffs to customers in areas where they have obtained pricing flexibility. *See* Report and Order at para. 59. As noted above, *supra* note 9, I have attached the General Counsel's Brief to my statement. I will leave it to readers (and potentially the D.C. Circuit) to decide for themselves whether these two unremarkable data points can explain the dramatic change in the Commission's position between October 2011 and today.

the state of the marketplace.

It acknowledges "limitations [in] our existing data set,"[15] concedes the "widespread accord in the record on the appropriateness of collecting additional data,"[16] and asserts that "further data . . . is needed" for "a comprehensive evaluation of competition in the market for special access services."[17] Moreover, despite myriad findings regarding how well (or poorly) the existing competitive triggers reflect the state of competition in the special access marketplace, the Commission does not make a single finding about the effect our pricing flexibility rules have had upon that marketplace—and the reason, it is safe to say, is a lack of data.

For example, when it comes to the key issue of the effect that our pricing flexibility triggers have on prices, the most that the Commission can muster is that the "evidence is inconclusive."[18] Thus, it "does not pass judgment on assertions" concerning our rules' impact on prices.[19] Others who have looked at this question have reached a similar determination. The General Accounting Office has concluded that the Commission "needs a more accurate measure of effective competition and needs to collect more meaningful data,"[20] but drew no conclusions regarding how our pricing flexibility rules affected prices and deployment of special access services. Similarly, the National Regulatory Research Institute has concluded that "the available special access pricing data 'do not support any clear conclusions about price trends. Some data suggest rising prices, while other data suggest declining prices. Data quality could well be the reason for these ambiguities.'"[21]

Given the state of the record, the next step that we should be taking in this proceeding is obvious: a mandatory data collection.[22] In May, when the Chairman's Office first circulated an order addressing special access, I made it clear that I strongly supported moving forward with such a collection. Had we followed that path, we could have unanimously approved a mandatory date collection in June. But it is now August, and *still* no mandatory data collection has been issued. Remarkably, even today's order does not contain one; instead, it only contains a promise that a mandatory data collection will be forthcoming within 60 days.[23] A Commission aspiring to function as a data-driven agency should

[15] Report and Order at para. 52.

[16] *Id.* at para. 85.

[17] *Id.* at para. 7.

[18] *Id*. at para. 81.

[19] *Id*. Given that today's decision makes no findings as to how our current rules are impacting prices or competition in the special access marketplace, the Chairman's assertion that Commissioner McDowell and I have "no answer to the harm" that our approach would allegedly cause misses the mark. We cannot rebut findings that are nowhere to be found in the item.

[20] GAO REPORT at 15.

[21] General Counsel's Brief at 19 (quoting PETER BLUHM & ROBERT LOUBE, NATIONAL REGULATORY RESEARCH INSTITUTE, COMPETITIVE ISSUES IN SPECIAL ACCESS MARKETS 67 (Jan. 21, 2009) (NRRI REPORT)).

[22] Our past voluntary efforts have failed to provide the data we need in part because "the vast majority of the service provider members of . . . the trade association COMPTEL[] did not provide any data in response to the agency's October 2010 request." General Counsel's Brief at 14. If voluntary requests cannot provide the data we need, a mandatory data collection—with real penalties for non-compliance and an actual enforcement mechanism—is the only logical solution.

[23] Report and Order at paras. 7, 86.

prioritize gathering the facts, not jumping to conclusions.

* * *

We should bring this decade-old proceeding[24] to a close soon so that special-access providers and purchasers will have the regulatory certainty they need to carry out their businesses and invest in high-capacity infrastructure. The Commission apparently agrees: It aims "for final conclusions on the need for overall reform of the special access marketplace to occur in 2013."[25] I fear, however, that today's order does not move us closer to resolving this proceeding; it moves us farther away.

To begin with, the Commission's timeframe is just not realistic. Any reasonable outline of the necessary steps in the regulatory process illustrates why this is so. Let us say the Commission does meet its 60-day target and issues a mandatory data collection in October. The Paperwork Reduction Act does not allow such information collections to take immediate effect; instead, we must first seek approval from the Office of Management and Budget (OMB). Assuming we commence that process in a timely manner and everything goes smoothly, the comment period on our proposed information collection will end in December.[26] Then, if we respond to comments and submit the collection to OMB by January 2013, there will need to be another comment cycle, and the earliest OMB would approve the collection would be in March 2013.[27] Under the best of circumstances, we will collect the information by May (60 days). After that, our experts surely will need a few months to filter through that data, correct for errors, and analyze it; perhaps they could do it by September 2013. Next, we would need to develop a Notice of Proposed Rulemaking. If the NPRM were issued in November, the comment cycle would close in 2014. Final action in the proceeding might not happen for many months thereafter, if not for a year.

Even if such an aggressive schedule were possible, today's order makes it less likely that the Commission will be able to stick to it. For one, today's order declines to "exhaustively specify the factors that will comprise our market analysis,"[28] which muddies the contours of the mandatory data collection (how do we know what data to seek if we do not know what factors we should consider?). Instead, the Commission will seek public comment on the factors "in an upcoming notice"—sometime.[29]

Furthermore, the Commission's chosen framework—a full-blown market analysis—may provide "analytical precision,"[30] but it is also resource- and time-intensive. The fact that such analyses take up "considerable time and expense" on the part of all interested parties was precisely why the Commission

[24] Although this proceeding formally commenced in 2005, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25*; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*), it actually started with a 2002 petition to reform the Commission's pricing flexibility rules. *See* AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (Oct. 15, 2002).

[25] Report and Order at note 16.

[26] 44 U.S.C. § 3506(c)(2)(A).

[27] *Id.* § 3507(a)(1)(D).

[28] Report and Order at para. 86.

[29] *Id.*

[30] *Id.* Subsection V.B.2.

rejected conducting market analyses prior to granting regulatory relief in the *Pricing Flexibility Order*.[31]

All in all, today's decision illustrates two starkly different approaches for how the Commission should proceed in the face of uncertainty. In my judgment, when faced with an "incredible dearth of data," the right answer is to collect the necessary information and analyze that data before taking action. By contrast, the Commission's choice is to re-regulate first and collect data later.[32]

II.

Turning from procedure to substance, I strongly disagree with the merits of the Commission's decision to suspend the competitive showings (and accompanying regulatory relief) adopted for special access and transport services in the Commission's 1999 *Pricing Flexibility Order*.[33] In that order, the Commission recognized that traditional price-cap tariffing rules "clearly limit [price-cap carriers'] ability to respond to competition."[34] For example, traditional tariffing requires geographic averaging,[35] putting price-cap carriers to a Hobson's choice of "lowering a rate throughout the area at issue or not lowering the rate at all" when competing for an enterprise customer's business.[36] Similarly, unregulated competitors could use volume and term discounts as a means of attracting customers and recouping the up-front costs of investing in high-capacity infrastructure; restricting price-cap carriers from doing the same, as traditional tariffing did, "distort[ed] the market for access services by preventing [them] from competing efficiently."[37] In sum, traditional tariffing prevented price-cap carriers from "tailor[ing] services to their customers' individual needs"[38] resulting in less competition and less efficient deployment of high-capacity services.[39]

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[31] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221, 14271–72, para. 90 (1999) (*Pricing Flexibility Order*).

[32] I disagree with the Chairman's view that today's item preserves the status quo. Rather, it suspends pricing flexibility triggers that are part of the status quo. If, for example, a state were to suspend issuing driver's licenses tomorrow, I hardly believe that most people would think of such a step as preserving the status quo in any meaningful sense. Rather, it would constitute a fundamental change to the state's licensing regime. Similarly, the Commission's action here constitutes a substantial change to our regulatory regime for special access – a change that moves in a re-regulatory direction.

[33] *Id.* Part IV.

[34] *Pricing Flexibility Order*, 14 FCC Rcd at 14273, para. 92.

[35] In recognition that greater deaveraging of tariffs would benefit consumers and competition by bringing prices more in line with costs, the *Pricing Flexibility Order* expanded the ability of price-cap carriers to deaverage their special access rates. *See id.* at 14252–57, paras. 59–66. Even with deaveraging, however, price-cap carriers' flexibility remained constrained: Each pricing zone other than the highest priced zone had to account for at least 15 percent of the price-cap carrier's trunking revenues for the study area and the annual price increase within any given zone is limited to 15 percent. *Id.* at 14254–56, paras. 62–63.

[36] *Id.* at 14288, para. 122.

[37] *Id.* at 14289, para. 124.

[38] *Id.* at 14291, para. 128.

[39] Although small enterprise customers may not need their special access services tailored in any particular fashion, larger customers—which include regional and national wireless providers—may request highly specialized (continued….)

The *Pricing Flexibility Order* also recognized that, because ratemaking "is not an exact science,"[40] traditional price-cap tariffing could distort the competitive market and deter infrastructure investment. For example, Part 69 rate structure rules could "create implicit subsidies if [that rate structure] does not reflect accurately the manner in which [price-cap carriers] incur the costs of providing a service."[41] Similarly, competitive entry would be deterred if traditional tariffing required price-cap carriers "to price access services below cost in certain areas."[42]

The *Pricing Flexibility Order* determined that removing these regulatory obstacles to competition and infrastructure investment advanced the Telecommunications Act of 1996's deregulatory, pro-competitive national policy[43] and the goal of "foster[ing] competition and allow[ing] market forces to operate where they are present."[44] And its theory for when to afford relief was well within the mainstream of antitrust theory: The "presence of facilities-based competition with significant sunk investment," i.e., irreversible competitive entry, "makes exclusionary pricing behavior costly and highly unlikely to succeed."[45] In other words, the presence of competitive, high-capacity facilities in an area undermined a price-cap carrier's market power and justified allowing price-cap carriers to compete with their unregulated brethren.[46]

I do not read anything in the Commission's order as questioning the costs of traditional tariffing, the benefits of the deregulatory relief afforded through pricing flexibility, or even the theory of irreversible entry. Indeed, the Commission states that it cannot "evaluate . . . claims of competitive harm based on the evidence to date in the record."[47] Nevertheless, the Commission suspends the operation of the competitive triggers adopted in the *Pricing Flexibility Order* because they are supposedly "not working as predicted,"[48] are "both over-inclusive and under-inclusive,"[49] and are "likely resulting in both over- and under- regulation."[50] These conclusions are, in turn, premised on three assertions: (1) that the competitive showings are not as simple to administer as expected; (2) that collocation may produce an unreliable picture of competitive conditions; and (3) that competitive entry in the special access marketplace occurs in areas smaller than metropolitan statistical areas (MSAs). I address each of these

(Continued from previous page)
proposals for deployments covering a city or region. *See id.* at 14293, para. 133 (noting that traditional tariffing restricts the ability of price-cap carriers to compete for RFPs, but the contract tariffs of Phase I pricing flexibility should be sufficient to allow competition).

[40] *Id.* at 14276, para. 96.

[41] *Id.* at 14301, para. 154; *see also* 47 C.F.R. Part 69.

[42] *Id.* at 14301, para. 155.

[43] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[44] *Pricing Flexibility Order*, 14 FCC Rcd at 14235, para. 26.

[45] *Id.* at 14264, para. 80.

[46] The Commission's only hesitation—and the reason it required a competitive showing before affording regulatory relief—was its concern that automatic relief could lead to the exclusion of competitive entry or unreasonably high special-access prices. *Id*. at 14257, para. 68.

[47] Report and Order at para. 3.

[48] *Id.*

[49] *Id.* at para. 77.

[50] *Id.* at para. 22.

assertions in turn.

Administrative Simplicity.—The evidence that the existing triggers are administrable is simply overwhelming. By my count, the Bureau has processed 35 separate petitions for pricing flexibility encompassing over 200 separate requests for pricing flexibility, all within the 90-day deadline established by the Commission's rules.[51] That seems like a pretty substantial administrative success to me. This is even more so the case when the biggest "controversies" the Bureau has faced are mistakes by two petitioners regarding the scope of geographic relief[52] and minor ambiguities regarding whether particular wire centers or revenues should be counted as part of the competitive showing.[53]

Collocation.—I agree with the Commission that a competitor's collocation of high-capacity equipment within a price-cap carrier's wire center, coupled with the competitive provision of transport, is not a perfect proxy for channel termination facilities or facilities built out by non-collocating competitors.[54]

But then again, it was never meant to be. The *Pricing Flexibility Order* established collocation-and-transport triggers because the high costs of collocation suggested substantial sunk investment by competitors,[55] because the existence of competitive transport facilities at each collocation created actual competition for the price-cap carrier's transport services,[56] and because such a measure was administrable and verifiable.[57] Indeed, the arguments recited by the Commission against using collocation as a measure of competitive entry were presaged in the *Pricing Flexibility Order*. There, the Commission noted that collocation likely overstated competitive entry in the channel termination market because competitors are likely to focus their initial investments in carrying traffic from one aggregation point to the next and are most likely to collocate if they intend to use the price-cap carrier's last-mile facilities.[58] Conversely, "collocation may underestimate the extent of competitive facilities within a wire center because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed [price-cap carrier] facilities."[59] The *Pricing Flexibility Order* explicitly accounted for these imperfections when it established its competitive triggers.[60]

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[51] *See id.* Appendices D–F. I am only aware of two petitions that the Bureau did not issue orders resolving within the 90-day period. Both were filed earlier this year, and as I understand it, the Bureau was able to review both petitions in time but for whatever reason did not issue orders. Instead, it issued public notices explaining that each was deemed granted by operation of law.

[52] *Id.* at para. 63. Notably, our rules hardly make it easy on parties to determine the contours of what we call an MSA for purposes of the pricing flexibility triggers. The pricing flexibility rules refer to a definition within our rules defining cellular telephone markets, *see* 47 C.F.R. §§ 1.774(a), 22.909(a), and that definition provides no guidance whatsoever as to what year's MSA list is used for pricing flexibility purposes. That the occasional petitioner chose the wrong MSA list is an argument for clarifying our rules, not for suspending them.

[53] Report and Order at para. 64.

[54] *Id.* at paras. 68–70, 73.

[55] *Pricing Flexibility Order*, 14 FCC Rcd at 14265–66, para. 81.

[56] *Id.* at 14267, para. 82.

[57] *Id.* at 14267–68, para. 84.

[58] *Id.* at 14278–79, paras. 102–03.

[59] *Id.* at 14274, para. 95.

[60] *See id.* at 14274–76, 14278, paras. 95, 100–01.

Moreover, even if the *Pricing Flexibility Order* incorrectly predicted that facilities-based, collocating competitors would rely on price-cap carrier channel terminations "only on a transitional basis,"[61] that fact alone does not justify suspending the competitive triggers. The question the Commission needs to ask and answer if it wants to suspend the triggers based on this finding is why collocating competitors have not deployed channel termination facilities to the extent predicted by the *Pricing Flexibility Order* (assuming that to be the case). One possibility is that the persistence of price-cap regulation in Phase I areas or the potential competition triggered by the irreversible competitive entry of collocating (and non-collocating) competitors has in fact constrained special access prices so much that competitive deployment of last-mile channel terminations is unprofitable.[62] If true, the lack of such facilities would show that pricing flexibility *works*, not that it's broken. Another possibility, of course, is that build-out by non-collocating competitors has deterred collocating competitors from deploying their own last-mile channel terminations, a phenomenon that also would not provide any justification for suspending our pricing flexibility rules.

Geographic Scope of Relief.—The Commission's final attack on the pricing flexibility triggers targets the use of MSAs as the geographic scope of relief for pricing flexibility.[63] Today's order seizes upon a stray comment within the *Pricing Flexibility Order*—the decision to set revenues-based triggers higher than wire-center-based triggers "to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers"[64]—and then ably demonstrates that the current triggers do not always bear out that comment.[65] The Commission also finds, unsurprisingly, that "evidence suggests that demand varies significantly within any MSA,"[66] "that competitors have a strong tendency to enter in concentrated areas of high business demand,"[67] that "competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand,"[68] and that the few times we have granted regulatory relief outside of MSAs, the grants were "based on high concentrations of demand."[69]

None of these facts undermines the choice of MSAs as the most appropriate area for analyzing irreversible competitive entry into a market. The *Pricing Flexibility Order*, for example, specifically anticipated that "a few wire centers may account for a disproportionate share of revenues for a particular

[61] *Id.* at 14280, para. 104; *see* Report and Order at paras. 68–70 (arguing that collocation does not correlate with competitive channel terminations based on available data).

[62] Recall that the competitive triggers are based on the theory that irreversible competitive entry into a market constrains a price-cap carrier's ability to engage in anticompetitive conduct or significantly raise prices for sustained period. That theory does not depend on a competitor building out facilities to each and every special access customer. Instead, it recognizes that a competitor's investment-backed presence in a market creates the very real potential for competitive-facilities deployment, which in turn should constrain the behavior of price-cap carriers. The Commission recognizes that the issue is not just actual competition, but potential competition as well. *See* Report and Order at para. 85.

[63] *Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 72.

[64] *Id.* at 14277, para. 98; *see* Report and Order at paras. 42–43.

[65] Report and Order at paras. 44–47.

[66] *Id.* at para. 36; *see also id.* at paras. 37–40.

[67] *Id.* at para. 48; *see id.* at paras. 49–53.

[68] *Id.* at para. 36.

[69] *Id.* at para. 61.

service" and that is precisely why that order established revenues-based triggers.[70] Indeed, revenues-based triggers protect consumers by ensuring that the competitive facilities are located where the customers actually are. Revenues-based triggers also guard against gamesmanship by competitive local exchange carriers, who might only collocate in areas of high demand to prevent a price-cap carrier from receiving any regulatory relief.

What is more, the Commission's approach ignores the complete cost-benefit calculus underlying the *Pricing Flexibility Order*'s selection of MSAs rather than smaller geographic areas: choosing a smaller area would require the filing of "additional pricing flexibility petitions" (perhaps hundreds or thousands if done by wire center or zip code) that "might produce a more finely-tuned picture of competitive conditions" but cannot "justif[y] the increased expenses and administrative burdens."[71] If the Commission had reliable evidence that pricing flexibility granted under the existing triggers had led to anticompetitive conduct or unreasonably high prices in the portions of an MSA without collocation-and-transport based entry, I perhaps could see the logic behind requiring more granular geographic triggers despite the administrative hassle they would likely create. But again, we lack the data to make that type of determination.[72]

In short, the Commission seems to believe that using MSAs is flawed because the corresponding triggers grant price-cap carriers Phase II pricing flexibility even if a small minority of customers within an MSA does not have competitive facilities collocated at the nearest wire center.[73] It seems to me this is precisely backwards. The vast majority of customers within an MSA should not be denied the benefits of additional competition and infrastructure investment on the theoretical possibility that a few customers may face higher prices.

The Decision to Suspend the Triggers.—Even if I were convinced by the Commission's analysis that the current pricing flexibility triggers were incurably flawed, I still could not join today's order because the remedy the Commission chooses is fatally overbroad.

For example, if the problem with the triggers is that revenues-based triggers allow regulatory relief even if collocation and transport has occurred only in a few key wire centers, then the Commission should suspend revenues-based triggers, not all the triggers. If using MSAs yields pricing flexibility even when no competitor has deployed in a given wire center, then shrink the scope of a relief to a single wire center. If our rules are ambiguous regarding what wire centers or revenues to include in the analysis, we should clarify the rules. And if "our decision to use the non-MSA parts of a study area . . . has made it impossible for Embarq to obtain relief in Missouri despite the presence of competition,"[74] if the triggers deny "pricing flexibility where competitive alternatives are not recognized by the existing rules,"[75] if our

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[70] *Pricing Flexibility Order*, 14 FCC Rcd at 14276, para. 97.

[71] *Id.* at 14260, para. 74.

[72] The most relevant data the Commission cites regarding competitive deployment was confidentially filed by SBC in response to the 2005 NRPM. *See* Report and Order at para. 55 & notes 155–56. But we should not draw any firm conclusions about the state of facilities-based deployment from a single party's seven-year-old filing regarding four MSAs.

[73] For channel terminations, the revenues-based threshold is 85 percent, meaning the price-cap carrier receives less than 15 percent of its special-access revenues from customers in wire centers without collocation and competitive transport.

[74] Report and Order at para. 60.

[75] *Id.* at para. 77.

existing triggers actually understate the extent of competition within the marketplace,[76] then revision of the triggers is the right remedy. Indeed, suspending the current triggers because they are insufficiently broad is the regulatory equivalent of cutting off one's nose to spite one's face.

I also find the decision to suspend our pricing flexibility triggers troubling for three other reasons. First, the primary complaint I have heard in this proceeding is about the price of special-access services. And yet pricing flexibility Phase I, which we deny to any future petitioners today, only lets price-cap carriers *reduce* their prices in response to competition. I am not sure I see the consumer benefit in forbidding price reductions.[77]

Second, the Commission's analysis entirely focuses on the pricing flexibility triggers for special-access channel terminations. And yet the Commission suspends the triggers for transport services as well,[78] even though the collocation-and-transport triggers are not a proxy for potential special-access facilities (as they are with channel terminations) but instead represent the deployment of actual, competitive alternatives to a price-cap carrier's transport services.

Third, I question whether the Commission has provided adequate notice of its decision to suspend the pricing flexibility rules in a manner consistent with the Administrative Procedure Act. The Commission reasons that we have a "continuing obligation to practice reasoned decision making,"[79] and our rules allow us to suspend our own rules for "good cause."[80] No quibble here, but the APA demands more: We must either publish notice of our intent to suspend and amend our rules in the *Federal Register* or "for good cause find[] (and incorporate[] the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[81]

In a footnote, the Commission points to the *seven-and-a-half year old* Special Access NPRM as the source of its notice. But that item specifically rejected the request for "a moratorium on consideration of further pricing flexibility applications pending completion of the rulemaking."[82] Given that the Commission today does not purport to rule on a petition for reconsideration of that earlier decision (and the thirty-day deadline for the Commission to reconsider that decision *sua sponte* has long since passed), I fail to see how the Commission can reverse course here without providing new notice. In addition, leaving aside the requirements of the Administrative Procedure Act, the fact that the Commission is forced to rely upon a near-decade-old NPRM as the foundation for today's action itself demonstrates that the normal means of rulemaking have been subsumed by the end of re-regulation.

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[76] *Id.* at paras. 77, 103.

[77] *See*, *e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

[78] Report and Order at para. 79.

[79] *Id.* at para. 77 (citing *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991)).

[80] *Id.* at para. 78 (citing 47 C.F.R. § 1.3).

[81] 5 U.S.C. § 553(b). Nothing in the Commission's order suggests that "notice and public procedure" would be impractical here, and I do not think that our newfound disagreement with the Clinton Administration's deregulatory framework would constitute "good cause" to waive such notice.

[82] *Special Access NPRM*, 20 FCC Rcd at 2035, para. 128.

III.

Aside from disagreeing with the Commission's decision to suspend the pricing flexibility triggers, I also cannot follow the path forward sketched out by the Commission.

First, the Commission suggests that a market-power/non-dominance analysis should be the test for any regulatory relief.[83] The *Pricing Flexibility Order* specifically considered—and rejected—that approach,[84] and I agree. For one thing, "non-dominance showings are neither administratively simple nor easily verifiable."[85] Instead, they require the Commission to consider "several complex criteria," such as market share and supply elasticity, which "generate considerable controversy that is difficult to resolve."[86] For another, I agree with the *Pricing Flexibility Order* that the costs of "delaying regulatory relief outweigh any costs associated with granting that relief before competitive alternatives have developed to the point that the incumbent lacks market power."[87] For yet another, the market power test developed in the *Competitive Carrier* proceedings[88] has traditionally been used by the Commission to determine when regulatory obligations should be effectively eliminated—not merely altered.[89] And because pricing flexibility does not grant price-cap carriers "all the regulatory relief we afford to non-dominant carriers," a market power test is simply unnecessary.[90]

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[83] Report and Order Section V.B.

[84] *Pricing Flexibility Order*, 14 FCC Rcd at 14271–72, para. 90.

[85] *Id.*

[86] *Id.* Indeed, the Commission singled out market share analyses as especially burdensome, requiring "considerable time and expense" on the part of all interested parties. *Id.*

[87] *Id.*

[88] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (initiating those proceedings).

[89] *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 FCC 2d 1020 (1985) (imposing mandatory detariffing on non-dominant carriers), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (imposing mandatory detariffing on non-dominant interexchange carriers); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1479, para. 178 (1994) ("Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest."); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CCB/CPD No. 96-3, 96-7, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (imposing permissive detariffing on non-dominant local exchange carriers); *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (denying non-dominant carrier treatment based on a market power test). This is because "firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 31, para. 88 (1980).

[90] *Pricing Flexibility Order*, 14 FCC Rcd at 14300, para. 151.

Second, the Commission seems to consider forbearance under section 10 of the Act to be a sufficient means of granting regulatory relief to price-cap carriers during the suspension of the competitive triggers.[91] But the *Pricing Flexibility Order* adopted the competitive triggers in response to forbearance petitions filed by price-cap carriers,[92] and specifically rejected forbearance (and the pending forbearance petitions) because the bright-line competitive triggers obviated the need for the Commission to make "difficult market share determinations," as required by forbearance petitions.[93] Moreover, forbearance petitions are handled in a far less timely manner than are petitions for relief under our pricing flexibility triggers. The Commission usually takes fifteen months to process the former, while the latter have almost always been resolved within 90 days.

Third and finally, the Commission seems to discount the value of administrative simplicity in favor of analysis on a more granular basis. I certainly agree that we should strive to understand the market as best we can. But I also agree with the assessment of the *Pricing Flexibility Order* that we must not let the perfect be the enemy of the good. We are an agency of limited resources, after all, and congressional appropriators are not likely to increase our budget to analyze pricing flexibility petitions if we switch the geographic scope of our analysis from 306 MSAs to more than 40,000 zip codes.

IV.

At the end of the day, those in the private sector will likely be left with the same question that I am: Why is the Commission in such a rush to re-regulate? As the Commission pointed out to the D.C. Circuit, there are several avenues available to those who believe that carriers are offering special access at rates, terms, and conditions that are not "just and reasonable." First, "[i]f they object to the rates or terms contained in a newly filed special access tariff, [they] can ask the FCC to suspend [a] tariff for up to five months and to hold a hearing on the tariff's lawfulness pursuant to section 204 of the Act, 47 U.S.C. § 204."[94] Second, "if [they] believe that [carriers] are providing special access on terms or conditions that are not just and reasonable, they can bring an action in federal district court seeking damages under sections 206 and 207 of the Act, 47 U.S.C. §§ 206–207."[95] Or third, "they can file an administrative complaint with the Commission under section 208."[96] If these alternatives were good enough for the Commission ten months ago, why are they no longer sufficient today?[97] And more broadly, if the

[91] Report and Order at para. 6.

[92] *See, e.g.*, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157 (filed Aug. 24, 1998).

[93] *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA et al.*, CC Docket Nos. 98-157 et al., Memorandum Opinion and Order, 14 FCC Rcd 19947, 19948, para. 2 (1999); *id.* at 19953, para. 11 ("As the record in these proceedings clearly illustrates, non-dominance showings are neither administratively simple nor easily verifiable. The Commission previously has based non-dominance findings on complex criteria, including market share and supply elasticity. Market share analyses require considerable time and expense, and they generate controversy that is difficult to resolve.").

[94] General Counsel's Brief at 27.

[95] *Id.* at 28.

[96] *Id*.

[97] The Commission's only answer to this question is it prefers to take a systemic approach to deal with "systemic issues with [the] special access rules." Report and Order at note 268. Among other problems with this response, the Commission today does not make any "systemic" findings regarding the effect of our current pricing flexibility triggers on either special access prices or the competitiveness of the marketplace.

Commission did not have sufficient data to take action back then, how are things any different today?

I do not know the answer to these questions, and neither will those in the private sector. I fear that those who must decide whether to invest tens of billions of dollars in next-generation networks will conclude that this Commission's first instinct is to re-regulate, even though it is unable to assess the competitiveness of the special access market or the effect of the current pricing flexibility triggers on prices given the current state of the record.

What does this portend for the future? If the Clinton Administration's deregulatory framework for special access can be dismantled upon such a thin record, will our current deregulatory framework for fiber survive? The private sector will have serious doubts (as do I), and this uncertainty will chill industry's willingness to invest capital in broadband infrastructure, deploy next-generation broadband networks, and create jobs. In a misguided attempt to re-regulate the networks of yesterday,[98] we will end up deterring investment in the IP networks of tomorrow.

* * *

At the end of *Alice's Adventures in Wonderland*, Alice wakes up from a trial that has gone awry to discover that it had all been a dream. Similarly, it is my hope that someday, we will look back on today's order as merely a fleeting departure from the pursuit of policies that provide strong incentives for infrastructure investment and facilities-based competition. If the Commission can re-regulate special access on evidence comparable to that presented against the Knave of Hearts,[99] then it will not be difficult to reverse today's decision and return to a more pragmatic path.

Until then—curiouser and curiouser. I respectfully dissent.

[98] For example, DS1 connections, which provide service at 1.5 Mbps, do not even qualify as broadband according to the benchmark outlined in the National Broadband Plan or our recent *Broadband Deployment Reports*. *See* Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan, at 135 (setting a broadband target of 4 Mbps downstream); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9563, para. 11 (2010) (defining broadband for as a service with speeds of at least 4 Mbps downstream).

[99] *See* CARROLL, ALICE'S ADVENTURES IN WONDERLAND ("'If that's all you know about [the Knave's alleged theft of the Queen's tarts], you may stand down,' continued the King. 'I can't go no lower,' said the Hatter: 'I'm on the floor, as it is.'"); *id*. ("'Give your evidence,' said the King. 'Shan't,' said the cook."); *id*. ("Alice watched the White Rabbit as he fumbled over the [witness] list, feeling very curious to see what the next witness would be like, '— for they haven't got much evidence *yet*,' she said to herself.").

ATTACHMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re COMPTEL, *et al.*,	)	No. 11-1262
Petitioners.	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR WRIT OF MANDAMUS

A group of telecommunications carriers and their trade associations, along with several groups representing users of telecommunications services, have jointly filed a petition for writ of mandamus. Petitioners ask the Court to direct the Federal Communications Commission ("FCC" or "Commission") to complete a rulemaking regarding "special access" telecommunications services and to issue new rules within six months, even though the Commission is still in the process of gathering data it needs to assess whether its special access rules should be revised.

Petitioners have failed to carry their heavy burden to justify the extraordinary remedy of mandamus. Contrary to their claim, the FCC has not unreasonably delayed completion of its special access rulemaking. That proceeding involves intensely fact-bound issues. Notwithstanding petitioners' undeveloped assertions to this Court, those issues cannot adequately be addressed until the Commission itself compiles an evidentiary record that is sufficient to

evaluate current conditions in the special access market. The agency has diligently sought to collect the data it needs.

In particular, in the past two years, the Commission has: (1) issued a November 2009 request for comment on the appropriate analytical framework for assessing the effectiveness of the current special access rules; (2) conducted a workshop in July 2010 regarding the analytical framework and the sort of data required to evaluate the special access market; (3) issued an October 2010 public notice requesting the submission of special access data; and (4) released another public notice in September 2011 requesting additional data concerning the rates, terms, and conditions for special access services. While the agency has made progress toward building a sufficient evidentiary record, its efforts have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable.

Particularly where (as here) there is no statutory deadline for agency action, the Commission has broad discretion to order its proceedings and to allocate its scarce resources by prioritizing other pressing policy objectives that, in the agency's considered judgment, merit more immediate attention. The FCC has reasonably exercised that discretion by, for example, devoting substantial resources to reforming its universal service and intercarrier compensation programs, even as

it continues to examine its special access rules.

In any event, even if petitioners could demonstrate unreasonable delay in this case – and they cannot – they are not entitled to the extraordinary remedy of mandamus for a separate and independent reason. Petitioners have other adequate alternative remedies under the Communications Act, including review of newly filed special access tariffs under 47 U.S.C. § 204, recovery of damages in federal district court under 47 U.S.C. §§ 206 and 207, and the administrative complaint process established by 47 U.S.C. § 208.

The petition for mandamus should be denied.

BACKGROUND

A. Special Access Services

To complete the transmission of an interstate telephone call, a telecommunications carrier "must have 'access' to the local networks at both the originating and receiving end of the call." *WorldCom, Inc. v. FCC,* 238 F.3d 449, 453 (D.C. Cir. 2001). Part 69 of the FCC's rules establishes two basic categories of access services: switched access and special access. 47 C.F.R. Part 69. Unlike switched access, which uses local exchange switches to route originating and terminating interstate telecommunications, special access employs dedicated facilities that run between the end user and the carrier's network or between two

discrete end user locations. *Access Charge Reform,* 14 FCC Rcd 14221, 14226 ¶ 8 (1999) ("*Pricing Flexibility Order*"), *petitions for review denied, WorldCom,* 238 F.3d 449. "Most users of special access services are companies with high call volumes." *WorldCom,* 238 F.3d at 453. Among other things, "[s]pecial access circuits connect wireless towers to the core network" and sometimes provide "the critical broadband link . . . between a small town and the nearest Internet point of presence." FCC, *Connecting America: The National Broadband Plan* 143 (2010), available at http://download.broadband.gov/plan/national-broadband-plan.pdf.

For many years, incumbent local exchange carriers ("ILECs") were the sole providers of access services. In the 1980s, however, competitive access providers ("CAPs") began to challenge the ILEC monopolies by offering limited end-to-end special access services over their own transport facilities. *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7373 ¶ 4 (1992), *on recon.,* 8 FCC Rcd 127 (1993), *rev'd in part and remanded in part, Bell Atlantic Tel. Cos. v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994). Under a 1996 amendment to the Communications Act, CAPS are entitled to install (or "collocate") their equipment at ILEC facilities. 47 U.S.C. § 251(c)(6).

B. Federal Price Cap Regulation Of Access Services

Historically, ILECs and other telecommunications carriers have been subject

to rate-of-return regulation, which "is based directly on cost." *National Rural Telecom Ass'n v. FCC,* 988 F.2d 174, 177 (D.C. Cir. 1993); *see also WorldCom*, 238 F.3d at 453. In October 1990, the FCC adopted a new framework for regulating the largest ILECs' rates – an incentive-based system that imposes "caps" on the aggregate prices that those carriers charge for certain services in a given area. *WorldCom,* 238 F.3d at 453 (citing 47 C.F.R. §§ 61.41-61.49). "Price cap regulation is intended to provide better incentives to the carriers than rate of return regulation, because the carriers have an opportunity to earn greater profits if they succeed in reducing costs and becoming more efficient." *Bell Atlantic Tel. Cos. v. FCC,* 79 F.3d 1195, 1198 (D.C. Cir. 1996).

For purposes of setting price caps, the Commission grouped different access services into "baskets." *See WorldCom*, 238 F.3d at 453. "For each basket, the Commission established a maximum price, called the price cap index." *Bell Atlantic*, 79 F.3d at 1198. Under the price cap system, "companies are relatively free to set their own prices so long as they remain below the cap." *WorldCom*, 238 F.3d at 454.

Carriers that are classified as "dominant" carriers are subject to price cap regulation. These price cap LECs must comply with tariff requirements, publishing rate changes before they go into effect. *WorldCom,* 238 F.3d at 454

(citing 47 U.S.C. §§ 203(a), 204(a)).

C. The *Pricing Flexibility Order*

In August 1999, the Commission adopted rules under which "price cap LECs would receive pricing flexibility in the provision of interstate access services as competition for those services develops." *Pricing Flexibility Order*, 14 FCC Rcd at 14225 ¶ 2. Those rules "granted immediate pricing flexibility [to price cap LECs] for some services." *WorldCom*, 238 F.3d at 454. They also provided for future pricing flexibility to be implemented in two phases. "In Phase I, LECs may offer contract tariffs and volume and term discounts, while remaining subject to some price cap rules and tariff requirements." *Id.* at 455. "In Phase II, LECs are given greater freedom to raise and lower rates outside of price cap regulation." *Id.* at 456.

To obtain pricing flexibility under Phase I or Phase II, a price cap LEC must file a petition demonstrating that certain competitive "triggers" have been met within a particular Metropolitan Statistical Area ("MSA"). The triggers are based on the extent to which competitive carriers have collocated their facilities on ILEC premises within the MSA. "The triggers measure market competition based upon investments in infrastructure by potential competitors. . . . [T]he more relief sought, the higher the trigger is set – that is, a greater level of investment by

competitors is required." *WorldCom,* 238 F.3d at 455.

"In order to obtain Phase I relief" for special access services, an ILEC "must show collocation in fifteen percent of wire centers within the MSA in which relief is sought, or in wire centers accounting for at least thirty percent of revenues for services in question." *WorldCom,* 238 F.3d at 455-56. To qualify for Phase II relief, an ILEC must demonstrate more extensive deployment of competitive facilities: "collocation in fifty percent of wire centers within the MSA in which relief is sought or in wire centers accounting for at least sixty-five percent of revenues for services in question." *Id.* at 456. In addition, before an ILEC can obtain pricing flexibility under either Phase I or Phase II, "at least one competitor must rely on transport facilities provided by a non-incumbent LEC in each wire center relied on in the applicant LEC's petition." *Id.*

The FCC acknowledged that its pricing flexibility rules could potentially allow for "Phase II relief before the manifestation of actual competitive alternatives for interstate access service customers." *WorldCom,* 238 F.3d at 456. Nonetheless, the Commission concluded that "the costs of delaying regulatory relief outweigh the potential costs of granting it before [competitive carriers] have a competitive alternative for each and every end user." *Id.* (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14297 ¶ 144). The Commission recognized that

its selection of pricing flexibility triggers was "not an exact science," but rather a policy determination "based on our agency expertise, our interpretation of the record before us in this proceeding, and our desire to provide a bright-line rule to guide the industry." *Pricing Flexibility Order*, 14 FCC Rcd at 14276 ¶ 96.

On review, this Court rejected various challenges to the FCC's pricing flexibility rules. *WorldCom*, 238 F.3d at 457-64. It held that the Commission acted reasonably in using collocation as a proxy for competition. *Id.* at 458-60. The Court also held that the agency based its collocation triggers on reasonable predictive judgments that were entitled to deference. *Id.* at 461-62.

D. The CALLS Plan

In May 2000, the Commission adopted "an integrated interstate access reform and universal service proposal" made by the Coalition for Affordable Local and Long Distance Service ("CALLS"), a group of local and long-distance telecommunications carriers. *Access Charge Reform*, 15 FCC Rcd 12962, 12964 ¶ 1 (2000) ("*CALLS Order*"), *aff'd in part and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001). The CALLS plan was a five-year transitional mechanism "designed to further accelerate the development of competition in the local and long-distance telecommunications markets." *Id.* at 12965 ¶ 4. Among other things, the CALLS plan created "a separate special access

basket" for purposes of price cap regulation. *Id.* at 13033 ¶ 172.

The *CALLS Order* gave price cap LECs a choice. They could either "subscribe to the CALLS [plan] for its full five-year term" or "submit a cost study based on forward-looking economic costs." *CALLS Order*, 15 FCC Rcd at 12984 ¶ 59. "All price cap carriers opted for the CALLS plan." *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994, 2000 ¶ 14 (2005) ("*Special Access NPRM*").

Although the CALLS plan "was intended to run until June 30, 2005," it remains in place and will continue in effect "until the Commission adopts a subsequent plan" to replace CALLS. *Special Access NPRM*, 20 FCC Rcd at 1995 ¶ 2.

E. AT&T's Petition For Rulemaking

In October 2002, AT&T filed a petition for rulemaking "essentially requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan as it pertains to the rates that price cap LECs . . . charge for special access services." *Special Access NPRM*, 20 FCC Rcd at 2002 ¶ 19.[1] AT&T

[1] At that time, AT&T was a purchaser of special access services and a competitor to the ILECs. In 2005, AT&T merged with SBC, an ILEC. As currently (continued….)

contended that "the predictive judgment at the core of the *Pricing Flexibility Order* has not been confirmed by marketplace developments," and that ILECs were charging unreasonably high rates for special access services. *Id.* at 2003 ¶ 19. In addition to seeking rule changes, AT&T requested interim relief while the rulemaking was pending. It asked the Commission to impose a moratorium on pricing flexibility and to reduce all special access charges to levels that would produce an 11.25 percent rate of return. *Id.*

The Commission's staff invited comment on AT&T's rulemaking petition.[2] Price cap LECs opposed AT&T's petition and disputed its claims. In particular, they asserted that "there is robust competition in the special access market," and that the existing special access rates were "reasonable and therefore lawful." *Special Access NPRM*, 20 FCC Rcd at 2003 ¶ 20.

In November 2003, AT&T filed with this Court a petition for writ of mandamus. It asked the Court to direct the Commission to act on AT&T's rulemaking petition and to grant the interim relief sought. *Special Access NPRM*,

(Continued from previous page)
constituted, AT&T is both an ILEC and an interexchange carrier, and thus is both a provider and a purchaser of special access services.

[2] *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 17 FCC Rcd 21530 (2002).

20 FCC Rcd at 2003 ¶ 21. In October 2004, the Court held the matter in abeyance and directed the Commission to provide status reports on December 1, 2004 and February 1, 2005. *Id.* at 2003-04 ¶ 21.

F. The *Special Access NPRM*

On January 31, 2005, the Commission released a notice of proposed rulemaking "to seek comment on the interstate special access regime that we should put in place post-CALLS." *Special Access NPRM*, 20 FCC Rcd at 2004 ¶ 22. The Commission specifically requested comment "on whether, as part of that regime, we should maintain, modify, or repeal the Commission's pricing flexibility rules." *Id.* Insofar as AT&T's petition requested a new special access rulemaking, the Commission granted the petition. *Id.* at 2042 ¶ 152. The agency also incorporated into this proceeding "the record already compiled in response to" AT&T's petition. *Id.* at 1997 ¶ 5.

At the same time it commenced the special access rulemaking, the FCC denied AT&T's request for interim relief. It found that "the evidence submitted by AT&T in its petition" was not "sufficient to justify the requested relief at this time." *Special Access NPRM*, 20 FCC Rcd at 2035 ¶ 129.[3]

[3] In the *Special Access NPRM*, the Commission sought comment "on what interim relief, *if any*, is necessary to ensure" that "special access rates remain reasonable" (continued….)

Shortly after the Commission notified the Court of the release of the *Special Access NPRM*, the Court dismissed AT&T's mandamus petition as moot. *In re AT&T Corp.,* 2005 WL 283198 (D.C. Cir. Feb. 4, 2005).

G. Subsequent Developments

In July 2007, the Commission invited interested parties to update the record in the special access rulemaking in light of a number of recent developments in the industry, including several "significant mergers and other industry consolidations," "the continued expansion of intermodal competition in the market for telecommunications services," and "the release by GAO [the Government Accountability Office] of a report summarizing its review of certain aspects of the market for special access services." *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, 22 FCC Rcd 13352, 13352-53 (2007).

While the special access rulemaking was pending, the FCC also addressed special access issues in several other proceedings. In two orders issued in October 2007, the agency granted petitions filed by AT&T, Embarq, and Frontier under 47 U.S.C. § 160 seeking FCC forbearance from enforcement of dominant carrier and

(Continued from previous page)
while the Commission considered "what regulatory regime will follow the CALLS plan." 20 FCC Rcd at 2036 ¶ 131 (emphasis added). Specifically, the Commission sought comment on a proposal to make interim rate adjustments to account for increased productivity in the provision of special access services. *Id.*

tariff filing requirements with respect to enterprise broadband special access services (*i.e.*, high-speed telecommunications services for businesses). *Petition of the Embarq Local Operating Companies for Forbearance,* 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance,* 22 FCC Rcd 18705 (2007). This Court affirmed those forbearance orders. *Ad Hoc Telecomm. Users Comm. v. FCC,* 572 F.3d 903 (D.C. Cir. 2009). In August 2008, the Commission granted Qwest's petition for similar relief from regulation of enterprise broadband special access. *Qwest Petition for Forbearance*, 23 FCC Rcd 12260 (2008). The Court dismissed a petition for review of that forbearance grant. *Ad Hoc Telecomm. Users Comm. v. FCC*, 2009 WL 2461594 (D.C. Cir. Aug. 7, 2009) (granting motion for voluntary dismissal).

During the summer of 2009, in the wake of the 2008 Presidential election, the Senate confirmed a new Chairman of the 5-member Commission and two new Commissioners.

In November 2009, the Commission sought comment on the appropriate analytical framework for examining the issues that the *Special Access NPRM* raised. *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd 13638 (2009) ("*Analytical Framework Public Notice*").

In July 2010, the FCC's Wireline Competition Bureau held a staff workshop to gather further input from interested parties on the analytical framework the Commission should use – and the data it should collect – to evaluate whether the current special access rules are working as intended. *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, 25 FCC Rcd 8458 (2010) ("*Staff Workshop Public Notice*").

In October 2010, the Wireline Competition Bureau issued a public notice inviting the public to submit data to assist the Commission in evaluating the issues that the *Special Access NPRM* raised. *Data Requested in Special Access NPRM*, 25 FCC Rcd 15146 (2010) ("*First Data Request Public Notice*"). Explaining that data "would need to be reviewed" before the Commission could address the issues raised by the proceeding, *id.* at 15146, the Bureau asked that the requested data be submitted on or before January 27, 2011. *Id.* at 15147. It also noted that while it continued to develop its analytical framework, it would "ask for additional voluntary submissions of data in a second public notice." *Id.*

On September 19, 2011, the Bureau issued its second public notice requesting the submission of special access data. *Competition Data Requested in Special Access NPRM*, DA 11-1576 (released Sept. 19, 2011) ("*Second Data*

Request Public Notice") (Attachment A). The Bureau asked for detailed data on special access prices, revenues, and expenditures, as well as the nature of terms and conditions for special access services. It requested that the data be submitted to the Commission by December 5, 2011.

While the Commission has made progress in its data-gathering efforts, the vast majority of the service provider members of the principal petitioner here (the trade association COMPTEL) did not provide any data in response to the agency's October 2010 request.[4]

[4] The member list on COMPTEL's website includes approximately 90 "service provider" members. *See* http://www.comptel.org/memberlist.asp?contentid=2109. According to the Commission's records, only seven of those member carriers – 360networks, Cbeyond, RCN, Sprint, TDS Metrocom, TelePacific Communications, and tw telecom – provided special access data in response to the agency's October 2010 request.

ARGUMENT

PETITIONERS HAVE NOT CARRIED THEIR BURDEN OF SHOWING THAT THEY HAVE A CLEAR AND INDISPUTABLE RIGHT TO THE EXTRAORDINARY REMEDY OF MANDAMUS

"Mandamus is a 'drastic' remedy available only in 'extraordinary situations.'" *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 333 (D.C. Cir. 2009) (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 401 (1976)). "Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Fornaro v. James,* 416 F.3d 63, 69 (D.C. Cir. 2005) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)). "The party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." *Power*, 292 F.3d at 784 (internal quotation marks omitted); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 289 (1988). Because petitioners have failed to carry that heavy burden here, the petition should be denied.

I. The FCC Has Reasonably And Responsibly Sought To Compile A Sufficient Evidentiary Record For Purposes Of Resolving The Complex Question Whether Its Current Special Access Rules Ensure Just And Reasonable Rates.

Petitioners contend that the Court should issue a writ of mandamus because

the FCC has unreasonably delayed action in its pending special access proceeding. Given the highly fact-bound nature of the issues raised by that proceeding – including the pricing issues that must be resolved based on a full evidentiary record – there has been no unreasonable delay, much less an "egregious" delay. *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988) (the "extraordinary remedy" of mandamus is "warranted only when agency delay is egregious").

In assessing whether an "agency's delay is so egregious as to warrant mandamus," the Court has declared that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("*TRAC*"). This "rule of reason" cannot be applied "in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). "Resolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Id.* at 1100. Thus, before determining whether an agency's delay is unreasonable, the Court must consider (among other things) "the complexity of the task at hand" and "the resources available to the agency." *Id.* at 1102. These factors weigh decisively against a finding of unreasonable delay in this case.

As a threshold matter, petitioners are wrong when they claim that "[t]here has been no resolution" of AT&T's 2002 petition for rulemaking. Petition at 21; *see also id.* (alleging a "near-decade of inaction"). To the contrary, the FCC acted on that petition when it initiated the special access rulemaking proceeding and denied AT&T's request for interim relief in 2005. *See* Background, Section F, *supra*. In the *Special Access NPRM*, the Commission explicitly stated that AT&T's petition for rulemaking was "GRANTED to the extent specified herein and otherwise [was] DENIED." *Special Access NPRM*, 20 FCC Rcd at 2042 ¶ 152. This Court recognized that the agency had taken action when it dismissed AT&T's mandamus petition as moot in 2005. *See id*.[5]

In any event, petitioners cannot show that the FCC unreasonably delayed action in this case. Their claim of unreasonable delay rests on a fundamentally flawed premise. Petitioners assert that the FCC "has known for nearly a decade that its predictions in the *Pricing Flexibility Order* were wrong." Petition at 14.

[5] Similarly, there is no basis for petitioners' suggestion that the FCC's representations to this Court in the AT&T mandamus litigation were misleading. *See* Petition at 11, 21. The agency never represented to the Court that a special access rulemaking would be completed within a specified timeframe. Rather, the Commission informed the Court in July 2004 that it expected to act on AT&T's rulemaking petition "in the near future" (*In re AT&T Corp.*, D.C. Cir. No. 03-1397, FCC Br. at 3), and it did so by issuing its *Special Access NPRM* in January 2005.

To the contrary, the FCC has yet to draw any firm conclusions about the accuracy of its predictions regarding special access. Instead, it is in the process of collecting and analyzing data to ascertain how the pricing flexibility rules have affected the special access market.

Petitioners maintain that a 2006 report by the Government Accountability Office "confirmed" that the predictions on which the FCC based its pricing flexibility rules were wrong. Petition at 14. But the GAO did not reach any such definitive conclusion.[6] Instead, the GAO Report confirms the FCC's need for additional data as it considers reform of its special access rules. "[I]n order to better meet its regulatory responsibilities," the GAO explained, the FCC "needs a more accurate measure of effective competition and needs to collect more meaningful data." GAO Report at 15. The Commission is now taking the very action that the GAO recommended.

Petitioners maintain that consumers are paying unreasonably high prices for

[6] The GAO merely noted that its analysis of the limited data available at the time "*suggests* that [the] FCC's predictive judgment – that MSAs with pricing flexibility have sufficient competition – *may* not have been borne out." GAO, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 42 (Nov. 2006) (emphasis added) ("GAO Report"), available at www.gao.gov/new.items/d0780.pdf.

special access under the pricing flexibility rules. Petition at 15-16. But the ILECs hotly contest petitioners' basic premise that special access rates have increased. Indeed, they contend that special access rates have steadily *declined* since the introduction of pricing flexibility.[7]

Even one of the reports on which petitioners rely (Petition at 14) notes that the available special access pricing data "do not support any clear conclusions about price trends. Some data suggest rising prices, while other data suggest declining prices. Data quality could well be the reason for these ambiguities." Peter Bluhm & Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets* 67 (Jan. 21, 2009).

[7] *See, e.g.,* Reply Comments of AT&T Inc., WC Docket No. 05-25, Feb. 24, 2010, at 4 ("Over the decade that [the pricing flexibility] rules have been in place, the prices that special access customers actually pay have decreased dramatically, output has risen sharply, both incumbents and their competitors have invested billions in new facilities," and "innovation has increased"); Reply Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, Feb. 24, 2010, at 6 ("the prices customers pay for special access services have followed an overall downward trend"); Declaration of Michael D. Topper on behalf of Verizon and Verizon Wireless, WC Docket No. 05-25, Jan. 19, 2010, at 37 ("Evidence presented in this proceeding indicates that special access prices have been steadily declining since pricing flexibility was introduced," and that the quantity of special access services "has increased significantly over time."); Declaration of Dennis W. Carlton and Hal S. Sider on behalf of AT&T Inc., WC Docket No. 05-25, Jan. 19, 2010, at 30 (citing evidence that "average special access prices have fallen substantially in areas where full Phase II pricing flexibility has been granted").

Lacking sufficient data to resolve this fundamental dispute, the Commission appropriately recognized that it should make no decisions about revising its special access rules before it has compiled and analyzed an adequate evidentiary record. In the last two years, since Chairman Genachowski's arrival at the agency, the Commission has taken a number of steps to build that record.

In November 2009, the agency sought comment on the appropriate analytical framework for examining the issues raised by the special access rulemaking. *Analytical Framework Public Notice*, 24 FCC Rcd at 13638-44. In July 2010, Commission staff held a workshop to obtain further input from interested parties regarding the analytical framework and the sort of data that the Commission would need to evaluate whether the current special access rules are working as intended. *Staff Workshop Public Notice*, 25 FCC Rcd at 8458-59.[8] In October 2010, the FCC's Wireline Competition Bureau invited the submission of data to help the agency evaluate the current special access regime. *First Data Request Public Notice*, 25 FCC Rcd at 15146-64. And just last month, the Bureau

[8] A transcript of the staff workshop can be found on the FCC's website at http://reboot.fcc.gov/c/document_library/get_file?uuid=f01ad781-6dd7-4ace-a7fc-bc296dc88315&groupId=19001. As the transcript makes clear, the issues raised by this proceeding are complicated, and economists disagree about the appropriate framework for analyzing the special access market.

requested that before the end of 2011, interested parties submit detailed data concerning the rates, terms, and conditions for special access services. *Second Data Request Public Notice*, DA 11-1576 (Attachment A).

As Chairman Genachowski explained in testimony to Congress, he found "the paucity of data that the FCC had" when he arrived at the Commission "very troubling," and he saw "no point to doing something in this area that's not based on a record, that's not based on facts and data, and that wouldn't be upheld in court." Transcript of Hearing of the Communications & Technology Subcommittee of the House Energy & Commerce Committee, May 13, 2011, at 40 (Mandamus Petition, Tab 13); *see also* Letter from FCC Chairman Julius Genachowski to Congressman Mike Doyle, August 19, 2011 (Attachment B) (noting that while "the data we have collected so far will help us to understand how best to move forward," the special access proceeding presents "a number of difficult issues" for which "there are no quick fixes").

Even one of the parties that advocates special access reform has acknowledged that the FCC will need to obtain and analyze more data before it can determine the appropriate course of action in this proceeding. In March 2011, Level 3 Communications told the Commission that "the competitive significance" of special access contract tariffs "is not ascertainable without further data." Letter

from Erin Boone, Level 3, to Marlene H. Dortch, FCC, WC Docket No. 05-25, March 7, 2011, at 2 (Attachment C). And in June 2011, representatives of Level 3 discussed with FCC staff "the types of pricing data concerning tariffed and non-tariffed special access purchases by Level 3 that might be available and useful to enable the Commission to more fully evaluate competition relating to such purchases." Letter from Erin Boone, Level 3, to Marlene H. Dortch, FCC, WC Docket No. 05-25, June 23, 2011, at 1 (Attachment D).

Unfortunately, the Commission has faced obstacles in its efforts to gather the data it needs to make an informed decision on special access. For instance, in response to the FCC's October 2010 request for special access data, fewer than 10 percent of petitioner COMPTEL's service provider members (7 of approximately 90) submitted data concerning their experience in the special access market. *See* note 4, *supra*.

The Commission is actively engaged in the process of gathering and analyzing data that might (or might not) bear out petitioners' assertions about special access pricing. This orderly and responsible administrative process should not be disrupted while the Commission is making steady progress.

"Absent some unreasonable delay or significant prejudice to the parties, the Commission cannot be said to abuse its discretion merely by adopting procedures

and timetables which it considers necessary to effective treatment of complex and difficult problems." *Telecomm. Resellers Ass'n v. FCC,* 141 F.3d 1193, 1196 (D.C. Cir. 1998) (quoting *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 (D.C. Cir. 1986)). Where (as here) an agency confronts complex and difficult questions, this Court has held that it is not unreasonable for the agency to take a number of years to resolve thorny issues. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA,* 912 F.2d 1525, 1534 (D.C. Cir. 1990) (the EPA's delay of "more than nine years" in resolving an issue was not unreasonable given "the unusual complexity of the factors facing the agency"). In light of these precedents, and in view of the Commission's diligent and conscientious efforts to gather the data it needs to resolve the issues presented by the special access rulemaking, the Court should deny the mandamus petition.

In assessing the reasonableness of the agency's conduct here, it is also significant that Congress has not "provided a timetable or other indication of the speed with which it expects the agency to proceed" in addressing the issues raised by the special access proceeding. *See TRAC,* 750 F.2d at 80. In the absence of a statutory deadline for action, the FCC "has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler v. Hayes,* 818 F.2d 879, 896 (D.C. Cir. 1987). The agency reasonably

exercised that discretion here.

For example, the Commission is currently devoting substantial resources to completing a comprehensive proceeding to reform its universal service and intercarrier compensation regulations in light of the changing telecommunications marketplace. The component of the federal Universal Service Fund that supports telecommunications services in high-cost areas has grown from $2.6 billion in 2001 to $4.3 billion in 2010, but it still primarily supports voice services. *Connect America Fund*, 26 FCC Rcd 4554, 4559 ¶ 6 (2011). Similarly, the current system of intercarrier compensation "was designed for a world of voice minutes and separate long-distance and local telephone companies." *Id.* In the last decade, however, the communications landscape has changed dramatically: More than 27 percent of adults live in households with only wireless phones; broadband Internet access revenues have surged from $13.1 billion in 2003 to $36.7 billion in 2009; and interconnected Voice over Internet Protocol subscriptions increased by 22 percent between 2008 and 2009. *Id.* at 4559-60 ¶ 8.

The Commission is working to release soon a comprehensive order that will fundamentally reform the universal service and intercarrier compensation regimes to adapt to these market developments. On October 6, 2011, Chairman Genachowski announced that he is circulating to his fellow Commissioners a

proposed set of comprehensive reforms to modernize the Universal Service Fund and the intercarrier compensation system. The Chairman has scheduled this proposal for a vote by the full Commission later this month. *See* "Connecting America: A Plan to Reform and Modernize the Universal Service Fund and Intercarrier Compensation System" (speech delivered by FCC Chairman Julius Genachowski, Oct. 6, 2011) (Attachment E).

The FCC personnel who have been working on the universal service and intercarrier compensation proceedings are the same personnel assigned to the special access rulemaking. To the extent that the Commission has not moved faster in the special access proceeding due to the agency's allocation of its available resources to the more pressing subjects of universal service and intercarrier compensation reform, that reflects a reasonable balancing of the agency's policy priorities.

To give another example of competing priorities, since 2004 the Commission has issued more than 20 orders addressing petitions for forbearance under 47 U.S.C. § 160, a number of which have involved special access issues. Unlike the special access rulemaking, however, forbearance proceedings are subject to a statutory deadline. The FCC must rule on a forbearance petition "within one year after the Commission receives it" (or within one year and 90 days

if the agency finds that an extension of the deadline is necessary). 47 U.S.C. § 160(c). If the agency fails to act by the deadline, the forbearance petition "shall be deemed granted." *Id.*; *see also Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007). Given the serious consequences of agency inaction in this context, the Commission understandably gives precedence to addressing forbearance petitions. The Commission thus has dedicated substantial resources to its forbearance proceedings – including in cases where the forbearance petition was withdrawn before the agency had an opportunity to issue its dispositive order. *See* Letter from Michael J. Copps, Acting Chairman, FCC, to Congressman Henry A. Waxman, June 5, 2009 (Attachment F) (documenting that FCC staff spent thousands of work hours on proceedings in which the petitioner withdrew forbearance petitions shortly before the statutory deadline for a Commission ruling). The Commission's decision to devote resources initially to proceedings involving forbearance petitions, rather than the special access rulemaking, was entirely reasonable under the circumstances.

In any event, the Commission is making steady and reasonable progress in its efforts to review the special access market. It has already collected a significant body of evidence regarding the operation of that market, and just last month, it requested the submission of additional special access pricing data before the end of

the year. Given the need for the agency to compile and analyze a comprehensive record to understand and address those issues properly, it would serve no useful purpose for the Court to impose on the agency an arbitrary deadline for completion of the special access proceeding. *See* Petition at 30 (requesting imposition of six-month deadline).

II. Even If Petitioners Could Demonstrate Unreasonable Delay In This Case, They Are Not Entitled To Mandamus Because Adequate Alternative Remedies Are Available.

Even if petitioners could establish an "egregious" delay by the FCC – and they cannot – they still would not be entitled to a writ of mandamus because they have "failed to show that there [is] 'no other adequate remedy available.'" *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 64 (D.C. Cir. 2010) (quoting *Power*, 292 F.3d at 784). To obtain the extraordinary remedy of mandamus, a litigant must demonstrate that he has "no other adequate means to attain the relief he desires." *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 35 (1980) (internal quotation marks omitted). Petitioners cannot make that showing here because adequate alternative remedies are available to them under the Communications Act.

Petitioners observe that the Commission "has a statutory mandate to ensure that rates, terms and conditions of special access and other telecommunications services are 'just and reasonable.'" Petition at 19 (quoting 47 U.S.C. § 201(b)).

Essentially, they maintain that ILECs are violating section 201(b) by offering special access at rates, terms, and conditions that are not "just and reasonable." Petitioners conclude that the Commission therefore should revise its rules to ensure that special access rates, terms, and conditions comply with section 201(b). But petitioners have several alternative avenues – other than an immediate overhaul of the special access rules – for pursuing the relief they seek.

If they object to the rates or terms contained in a newly filed special access tariff, petitioners can ask the FCC to suspend the tariff for up to five months and to hold a hearing on the tariff's lawfulness pursuant to section 204 of the Act, 47 U.S.C. § 204.[9] The statute requires the Commission to issue an order concluding such a hearing "within 5 months after the date" that the contested rate or term "becomes effective," 47 U.S.C. § 204(a)(2)(A), and provides for refunds, with interest, in the event the FCC determines that the rate is unlawful, 47 U.S.C. § 204(a)(1).

Alternatively, if petitioners believe that ILECs are providing special access on terms and conditions that are not just and reasonable, they can bring an action in

[9] Petitioners note that Verizon recently revised its special access tariff, increasing its rates. Petition at 15. Petitioners had the opportunity under section 204 to request suspension of that tariff revision and a hearing on its lawfulness. They did not.

federal district court seeking damages under sections 206 and 207 of the Act, 47 U.S.C. §§ 206-207. Or, as this Court has noted, they can file an administrative complaint with the Commission under section 208, 47 U.S.C. § 208. *See Ad Hoc,* 572 F.3d at 910 (if "ILECs try to abuse their control over special access lines," competitive carriers "can file § 208 complaints with the FCC"). Congress directed the Commission to address any section 208 complaint concerning tariffed special access rates and terms "within 5 months after the date on which the complaint was filed." 47 U.S.C. § 208(b)(1).

Given the availability of these alternative remedies, petitioners cannot legitimately claim that mandamus is the only available means of obtaining the relief they desire. The Court has repeatedly denied mandamus petitions in cases where an adequate alternative remedy was available to petitioners.[10] It should do likewise here.

[10] *See, e.g, Baptist Mem'l Hosp.*, 603 F.3d at 64; *Ass'n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 159-60 (D.C. Cir. 2007); *Power*, 292 F.3d at 786-88; *Northern States Power Co. v. U.S. Dep't of Energy,* 128 F.3d 754, 759 (D.C. Cir. 1997); *Council of and for the Blind of Delaware County Valley, Inc. v. Regan,* 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of mandamus.

Respectfully submitted,

Austin C. Schlick
General Counsel

Peter Karanjia
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ James M.Carr
James M. Carr
Counsel

Federal Communications Commission
Washington, DC 20554
(202) 418-1740

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